FEB 23 1963

IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 858

PARAGON OIL CO., INC.,
Libellant-Appellee-Respondent,

against

REPUBLIC TANKERS, S. A.,
Respondent-Appellee-Respondent,

YACIMIENTOS PETROLIFEROS FISCALES,
Respondent-Appellant-Petitioner

REPUBLIC TANKERS, S. A.,
Petitioner-Appellee-Respondent

against

YACIMIENTOS PETROLIFEROS FISCALES,
Respondent-Impleaded-Appellant-Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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YACIMIENTOS PETROLIFEROS FISCALES,
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REPUBLIC TANKERS, S. A.,
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YACIMIENTOS PETROLIFEROS FISCALES,
Respondent Impleaded-Appellant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Yacimientos Petroliferos Fiscales, an agency of the Argentine Government, held liable in admiralty under an indivisible intransferable C & F (cost and freight) purchase order to indemnify one of the parties for liability for damage to a vessel under a safe berth clause of a purported charter party made by the latter with an affiliated

corporation, prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit in the above entitled matter.

The Opinions of the Courts Below

The opinion of the United States District Court, Southern District of New York, Hon. Richard H. Levet, D. J., on the merits (Vol. I, A12-A30 of Appendix below) is not reported; and the opinion of Judge Frederick P. Bryan on the first impleader motion (Vol. I, A31-A32) is not reported. The opinion of the United States Court of Appeals for the Second Circuit (Lumbard, Ch. J., Friendly and Kaufman, CJs) R. Vol. IV, A53-A63 printed in the Appendix hereto, *infra* p. 2a, is reported in 310 F. 2d 169 Adv. Ops.

Jurisdiction

The principal decision of the Court of Appeals sought to be reviewed was rendered November 5, 1962; a timely petition for rehearing was filed November 20, 1962 and denied November 28, 1962, and a petition for leave to file a petition for rehearing was denied December 11, 1962.

The jurisdiction of this Court is found in 28 U. S. C. Sec. 1254(1) and 2101(c).

Questions Presented

1. Whether an indivisible intransferable C & F (cost and freight) purchase order, made as per the Revised American Foreign Trade Definitions—1941, or any part thereof, is a maritime contract within the admiralty jurisdiction of the United States; and whether the Federal Courts may exercise admiralty jurisdiction of an affirmative claim in contract by libel or impleader petition for damages or for indemnity for damages for alleged breach by the purchaser of a safe berth clause contained in such indivisible intransferable C & F contract.

2. Whether a purported charter party and a proceeding based thereon are unreal so as not to support a judgment in admiralty when made between two corporations of common ownership after one of them had made an indivisible intransferable C & F (cost and freight) contract with a purchaser, and the purported charterer, in a suit upon the charter, is represented by a proctor employed in the office of libellant's proctors. Whether its admission in evidence without proof of its execution is error prejudicial to the purchaser.

3. Whether the discovery and disclosure of collusion renders the collusion lawful or requires dismissal.

4. Whether a corporation, after receiving from a foreign government agency a purchase order for transportation of seven cargoes, and agreeing that it and the purchase order for the cargoes make one indivisible intransferable C & F (cost and freight) purchase order, may thereafter for its own convenience and profit contract with another corporation to transport one cargo, and embody therein a safe berth clause, except as an independent contractor and at its own assumed risk; and whether, if held liable upon its independent contract, it may nevertheless and for that reason have indemnity from the purchaser whose contract was indivisible and intransferable.

5. Whether a safe berth clause is relative to the known risks of tidal harbor and temporarily occupied berth, and may not be relied on when a vessel proceeds from Interseccion to the berth without first ascertaining while the vessel is at Interseccion whether the berth is available.

6. Whether a provision that the seller shall not be obliged to deliver or buyer obliged to receive the product when and while and to the extent prevented by recited causes precludes or affects the right to rely on a safe berth clause as an assurance against such recited causes.

Constitutional and Statutory Provisions Involved

The provisions involved of the United States Constitution (Art. III, sec. 2; Amendment Art. VII); and statutes (Judicial Code, 28 U. S. C. secs. 1333 and 1359) are printed in the Appendix, *infra*. The Revised American Foreign Trade Definitions—1941 are printed in 2 WILLISTON ON SALES, (Revised Edition) § 280j et seq. A copy issued by National Foreign Trade Council is submitted herewith. It was offered in evidence and the C and F definition and comments received as a YPF exhibit.

Statement of the Case

During the time when the Suez Canal was closed, shutting off shipments of oil from the Near East, and precipitating a crisis in oil purchases and tanker shipping for its delivery, your petitioner, an agency of the Argentine Government, in December 1956 contracted in New York for the purchase of seven cargoes of oil and the necessary tank vessels for the full transportation thereof, to be delivered at Buenos Aires/LaPlata at the rate of one cargo per month, January through July, 1957.

Petitioner's contract consisted of two "complementary" purchase orders, viz., Purchase Order No. NY 1970 addressed to Paragon Oil Company, Inc. (Del.), not a party to this suit, and Purchase Order No. NY 1971 addressed to "Republic Tankers". (See Vol. IV, for Purchase Order No. 1970, and Vol. II for Purchase Order No. 1971).

Both provided: "please enter an order for our account, *subject to the terms and conditions incorporated herein*, for the following material". No. 1970 then specified:

> "Seven (7) T-two size cargoes (15/17,000 long tons each cargo) of Commercial Fuel Oil Bunker 'C' in accordance with the specifications enclosed in this Purchase Order"

It then set forth "Guaranty Specifications" respecting Gravity API. Flash Point PMCC, Sulphur, Four Point, B SW, Viscosity SSF, BTU and Carbon Conradson.

Purchase Order No. 1971 specified:

> "Tanker ships necessary for the full transportation of 7 (seven) cargoes (15,000 17,000 long tons, 10% more or less in Seller's option, each) of fuel oil Bunker 'C', awarded to Paragon Oil Co., Inc., as per purchase order NY-1970 at a rate of 1 (one) cargo each month to be delivered at Buenos Aires/LaPlata, January through July 1957."

It also provided that:

> "It is understood that the loading port can be any port in the world, but the freight rate will be $29.10 U. S. Currency per long ton.
>
> Paragon Oil Company, Inc. will designate the port of loading for each vessel as indicated in Purchase Order NY-1970. Time allowed for discharging 60 (sixty) hours—demurrage rate per hour at discharging port $360.00 per hour."

Each of the two purchase orders contained "Special Conditions" that it is "an integral part in all effects and results" with the other, that "Furthermore and reciprocally" the other is "an integral part in all effects and results" with it; and that "the total purchase" of the seven cargoes and the necessary transportation "makes only one indivisible intransferable C & F (Cost and freight) purchase order as per the definition of the 'Revised American Foreign Trade Definition-1941';" and that the beneficiaries "fully agree with these conditions."

The libel herein is by a third corporation, a stranger to the indivisible intransferable purchase order, but in contract for damage to a tanker sustained April 17, 1957, which libellant alleged it chartered to Republic Tankers, S. A. for one voyage, and which grounded at Buenos Aires. The libel claimed against both Republic Tankers, S. A. alleging a safe berth clause contained in the alleged charter party of March 16, 1957, and against your petitioner a similar provision in the December 1956 contract of your petitioner.

Republic Tankers, S. A. was not served with process, and did not appear until after your petitioner had appeared

and answered. It then filed an answer and later two impleader petitions by a proctor in the employ of libellant's proctors. Notwithstanding proof by affidavits of this fact, the District Court allowed Republic Tankers, S. A. to implead your petitioner, and to be represented throughout by Mr. Gilchrist, a proctor employed in the office of libellant's proctors.

Allegations of admiralty and maritime jurisdiction in pars. Ninth and Fifteenth of the libel (Vol. I, A34, A36) and in par. Eighth of the Impleader Petition (Id. A74) were denied in pars. Sixth and Twelfth of your petitioner's answer to the libel (Id. A39) and in par. 8 of its answer to the impleader petition (Id. A80). See also affidavit opposing motion to implead (Id. A77-A78).

The March 16, 1957 "charter party" was offered and admitted in evidence, over petitioner's objection, at the start of trial, without a word of testimony, the Court ruling that "The effect against YPF will have to be determined" (Vol. I, A 92).

In contrast to the freight rate of $29.10 specified in petitioner's contract, this purported contract between libellant and Republic specified the Former USMC T-C rate +65%. As the former USMC T-C rate was $6.80, the addition of 65% would make the "charter" freight rate $11.22, a difference of $17.88 per long ton from the $29.10 rate specified in petitioner's contract. And in contrast to the demurrage rate of $360 per hour prescribed in Purchase Order 1971, the rate in the purported charter is $120 + 65% (or $198), a difference of $162.00 per hour.

Ships entering at Buenos Aires make three stops, first at Recalada, where a pilot is taken on board, then at Interseccion or the Roads, where pilots are changed, and finally at a berth.

On April 16, 1957, when the ship's agent Milanowski representing Republic was told that berth C would be used for discharging the cargo, the berth was occupied by an Esso barge. The master was informed of this by the spe-

cial pilot who boarded the vessel at Interseccion on the morning of the 17th. Abnormal tide had been in evidence for several days and, instead of waiting at Interseccion until the barge first vacated the berth, the pilot and master decided to take the vessel on in. On this same morning, government officials, including a representative of your petitioner, reported to the agent Milanowski, pursuant to his request, and were "ready to go on board the tug 'Triunfador' " in order "to go on the tug boat to the roads" (Vol. I, A 131, 132, 129-130); but the vessel was seen already approaching the port (Id. A131).

It was 1:30 in the afternoon before the barge departed (Id. A141) and the vessel was then aground, due to the fall in the tide. Under direction of Camerata and the master, "several maneuvres" were made (Id. A156) including "a little maneuvering with the engine to assist her to come near" (Id. A158), although knowing that "if we made maneuvers the steamer would suffer" (Id. A154), and on the morning of the 19th it was discovered that the vessel had been damaged (Id. A101).

The District Court made two separate but complementary decrees, one of which (Id. A6-A8) dismissed the libel as to your petitioner as a respondent (Id. A6) but "Ordered, adjudged and decreed that respondent Republic Tankers, S. A., is liable to libellant for breach of the safe berth clause contained in the Charter Party" (Id. A7); and the other (Id. A9-A11) "Ordered, adjudged and decreed that respondent Yacimientos Petroliferos Fiscales is liable to respondent Republic Tankers, S. A. for breach of the safe berth clause contained in the Affreightment Contract" (Id. A10).

On appeal by your petitioner from both decrees and from the two District Court orders respecting (and one of which granted) the application of Republic Tankers, S. A. to implead your petitioner to indemnify it for breach of the December 1956 agreement, and on motion by your petitioner in the Court of Appeals to vacate both decrees, argued simultaneously with said appeal, the Court of Ap-

peals (Lumbard, Ch. J., Friendly and Kaufman, C.Js.), in an opinion by Judge Friendly, held that "*The judgment* is affirmed and the motion to vacate dismissed." The preamble to the opinion, describing the appeal as "Appeal from *a judgment* of the District Court . . . holding *appellant* liable for damages to a tanker by reason of breach of a safe berth clause", misstates the appeal which was from *both* decrees, including the one holding Republic Tankers, S. A. liable to libellant, and from the two orders on the impleader motions, as well as from the separate decree holding your petitioner liable to indemnify Republic Tankers, S. A. The Court of Appeals also denied a timely petition for rehearing and denied a further petition for leave to file a petition for rehearing and for a stay of the mandate pending application for certiorari to this Court. It dismissed the motion to vacate the decrees.

In making the first decree the District Court exercised admiralty jurisdiction to render a judgment between two corporations of common ownership and whose suit was not in any real sense adversary, and did not involve an "actual controversy" or adverse presentation of rights to be adjudicated between them, which is essential to the exercise of the judicial process (*California Comm.* v. *United States*, 355 U. S. 534, 536 and cases cited *infra*).

In making the second decree, the Court exercised admiralty jurisdiction to render a judgment upon an affirmative claim for breach of an indivisible intransferable C & F (cost and freight) purchase order which is not a maritime contract within the substantive jurisdiction of admiralty (*Armour & Co.* v. *Fort Morgan SS Co.*, 270 U. S. 253, 257 and cases cited *infra*).

Reasons for Allowance of the Writ

The Court of Appeals for the Second Circuit has sustained the exercise of the judicial power and admiralty jurisdiction to hold liable one corporation to another when owned by the same owners and represented as purported adversaries by proctors from the same office, and for alleged

breach of a purported "charter party", introduced without proof of its execution, allegedly made between them, which at most would but shift from one to the other some of the duties and profits respecting one voyage which the purported charterer had already undertaken by the terms of a seven cargo "indivisible intransferable C & F (cost and freight) purchase order as per the definition of the 'Revised American Foreign Trade Definition—1941' "; and to hold your petitioner liable in admiralty to indemnify such charterer on a claim that petitioner breached the C & F purchase order.

The ruling conflicts with decisions limiting the admiralty jurisdiction to contracts which are purely maritime, and as not extending to C & F contracts, and limiting the exercise of the judicial power to cases which are actually adversary, and precluding its exercise when two purported adversaries are not adversaries in fact but represented by proctors employed by the same *Dominus litis*.

This is violative also of Art. III, § 2 of the United States Constitution and 28 U. S. C. § 1333, and tends to destroy the significance and value of the Revised American Foreign Trade Definitions—1941.

It also deprives your petitioner of the right to a jury trial provided for in the Seventh Amendment.

The decision conflicts also with decisions denying the right of an independent contractor to use a contract made with a third party to vary its rights and obligations under a prior indivisible and intransferable contract, or to change to a maritime contract a contract which is not maritime, or to have indemnity for a liability occasioned by its own wrong or breach of contract.

In view of these conflicts, the importance in American foreign trade of the Revised American Foreign Trade Definitions—1941, and consequent importance of the questions to "buyers and sellers throughout the world", a review of the decision by this Court is plainly warranted.

This Court has held that: "An appellate federal court must satisfy itself not only of its own jurisdiction, but

also of that of the lower courts in a cause under review" (*Mitchell* v. *Maurer*, 293 U. S. 237, 244. See also *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379, 382-386; *Parker* v. *Ormsby*, 141 U. S. 81, 83; *Perez* v. *Fernandez*, 202 U. S. 80, 100; *United States* v. *Corrick*, 298 U. S. 435, 440; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 588; *Armour & Co.* v. *Fort Niagara SS Co.*, 270 U. S. 253, 259; *Matson Navigation Co.* v. *United States*, 284 U. S. 352, 359).

"Questions of importance in judicial administration were obviously involved by the disposition below" (*Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575, 580); "important questions relating to the scope of admiralty jurisdiction and its exercise are in issue" (*Swift & Co.* v. *Compania Columbiana*, 339 U. S. 684); "questions affecting the relations of the United States with foreign nations, and whose decision is of public importance" (Robertson & Kirkham's Jurisdiction of the United States Supreme Court, § 349; *Forsyth* v. *Hammond*, 166 U. S. 506, 514).

I

The indivisible intransferable C & F (cost and freight) contract made as per the Revised American Foreign Trade Definitions—1941 was not a maritime contract, but one covering sale, transportation and delivery of seven cargoes of goods of guaranty specifications; and the exercise of admiralty jurisdiction of a claim thereon violates Art. III, § 2 of the Constitution, conflicts with decisions of this Court; and the question is of special importance to American foreign trade and to buyers and sellers throughout the world.

Both by their interlocking terms and specifications and by their "Special Conditions" so providing, Purchase Order No. 1970 and Purchase Order No. 1971 constitute one indivisible intransferable contract for future C & F (cost and freight) sale, transportation and delivery of goods to conform to stated "Guaranty Specifications" and "to be

delivered" in stated quantities at stated future intervals for total fixed costs per unit, including fixed freight and demurrage at the discharge port, regardless of "any port in the world" from which they might be shipped.

Under these provisions, without more, the contract of your petitioner was a C & F contract of purchase and sale specifying "the time and place of *delivery*" (*Segall* v. *Finlay*, 245 N. Y. 61, 65; italics by the Court); all risks as respects availability of ships equally with those as to availability of the goods for delivery in the stated quantities at the stated intervals were the sellers' risks, undertaken for specified and unalterable total sums representing total cost (*Compania De Navegacao Lloyd Brasileiro* v. *C. G. Blake Co.*, 2 Cir., 34 F. 2d 616; *Dixon, Irmaos & Cia.* v. *Chase Nat. Bank*, 2 Cir., 144 F. 2d 759, 763; *Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.*, 2 Cir., 147 F. 2d 399, 403, cert. denied 325 U. S. 861; *Williams Grain Co.* v. *Leval & Co.*, 8 Cir., 277 F. 2d 213, 215).

Embodying, as they did, "Guaranty Specifications" as respects the oil, as well as provisions for the deliveries in stated quantities at stated times, the contract was one which could be wholly repudiated, or repudiated as respects any cargo tendered for delivery at the designated port, if the goods failed to meet the guaranty specifications, or if not delivered in the quantities and at the times specified, with the buyer entitled in any such case to recover previously paid price including prepaid freight (*Pope* v. *Allis*, 115 U. S. 363, 372; *Norrington* v. *Wright*, 115 U. S. 188, 203; *Filley* v. *Pope*, 115 U. S. 213, 219-220; *Cleveland Rolling Mill* v. *Rhodes*, 121 U. S. 255, 261, 264). "The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract" (*Pope* v. *Allis*, *supra*, 115 U. S. 363, at 372, holding at p. 373 that a suit by the buyer to recover the price previously paid was well brought). Moreover, "The subsidiary provi-

sions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities" (*Norrington* v. *Wright, supra,* 115 U. S. 188, 203-204).

Equally, the extraordinarily high freight rate and extraordinarily high demurrage rate, being fixed along with the price, the contract differs from one whereby the buyer would be entitled to claim overcharge of unspecified freight or of price in the guise of unspecified amounts of freight (Cf. *Krauss Bros* v. *Dimon S. S. Co.*, 290 U. S. 117, 122; *Israel* v. *Moore-McCormack, Inc.*, SDNY, 295 Fed. 919, app. dismissed 257 U. S. 668). If a demurrage clause "is an obligation to pay irrespective altogether of what the seller's position may be, if in fact the vessel is kept upon demurrage", then "it really provides for an addition to the price of the rice depending upon whether the ship is or is not delayed in its discharge" (*Suzuki & Co.* v. *Compania Mercantile Internacional*, 9 Ll. L. R. 171).

For these reasons, without more, therefore, the contract consisting of Purchase Order No. 1970 and Purchase Order No. 1971 was not a maritime contract within the admiralty jurisdiction.

This Court and distinguished judges sitting in other Federal Courts have held that a court of admiralty has no jurisdiction of the subject matter of an affirmative claim, whether by libel, cross-libel or impleader petition, based upon breach of a non-maritime contract; that contracts to be enforceable in admiralty must be wholly maritime, and that contracts involving purchase and sale as well as transportation are not maritime contracts enforceable in admiralty (*Armour & Co.* v. *Fort Morgan S. S. Co.*, 270 U. S. 253, 259; *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 735, citing *Pacific Surety Co.* v. *Leatham & Smith T. & W. Co.*, 151 Fed. 440; *The Eclipse*, 135 U. S. 599, 608; *The Lake Galera*, 2 Cir., 60 F. 2d 876, 880; *The Ada*, 2 Cir., 250 Fed. 194; *Aktieselskabet Fido* v. *Lloyd Braziliero*, 2 Cir., 283 Fed. 62, 72-74, Cert. denied 260 U. 737; *Yone Suzuki* v. *Cen-*

tral Argentine Ry., 2 Cir., 27 F. 2d 795, 807, cert. denied 278 U. S. 652; *The Alert (Soderberg* v. *Atlantic Lighterage Corp.)*, 2 Cir., 19 F. 2d 286, 288; *The Pennsylvania*, 2 Cir., 154 Fed. 9, 12; *The Richard Winslow*, 71 Fed. 426; *The Navigadora No. 73*, D. C. N. J., 45 F. 2d 639; *French Republic* v. *Fahey*, D. C. Md., 278 Fed. 947-949; *Adler* v. *Golbraith Bacon & Co.*, D. C. Wash., 156 Fed. 259; *Andrews* v. *Essex Fire & Marine Ins. Co.*, 3 Mason 6, 1 Fed. Case #374, pp. 885, 889 (Story, J.); *Plummer* v. *Webb*, D. C. Me., 19 Fed. #11,233, pp. 891, 894; *Richard* v. *Hogarth*, D. C. N. J., 94 Fed. 684; *Rhederi Actien Gesellschaft Oceana* v. *Clutha Shipping Co.*, D. C. Md., 226 Fed. 339, 343-344; *Woodcraft Works Ltd.* v. *United States*, Ct. of Cl., 152 F. Supp. 82, 83).

This applies to claims by impleader petition, respecting which this Court, in *Armour & Co.* v. *Fort Morgan S. S. Co.*, *supra*, stated in footnote 1, p. 259 of 270 U. S. that

> "The application of Admiralty Rule 56 is limited by similar considerations of jurisdiction."

The controlling principle was stated in *The Ada*, *supra*, that:

> "It is well established that a contract enforceable in admiralty must be wholly maritime."

Applying this principle in *Armour & Co.* v. *Fort Morgan S. S. Co.*, *supra*, 270 U. S. 253, at 259, this Court, citing with other cases *The Ada*, *supra*, said:

> "The bill of lading and charter party are both maritime contracts and, hence, enforceable in a court of admiralty. *Morehead* v. *Enequist*, 23 How. 491; *The Eddy*, 5 Wall. 491, 494. The original contract to purchase, assemble, and sell the cattle, to charter vessels and therein transport the cattle to Jacksonville, and the agreement of compromise, are not maritime contracts. *The Richard Winslow*, 71 Fed. 426; *The Ada*, 250 Fed. 194."

There is no bill of lading pleaded or shown here; and your petitioner was not a party to the purported charter party.

In *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 735, this Court, citing *Pacific Surety Co.* v. *Leatham & Smith T. & W. Co.*, 151 Fed. 440, recently stated that "an agreement to pay damages for another's breach of a maritime charter is not" a maritime contract within the admiralty jurisdiction. And in the case there cited the Court stated, at 151 Fed. 447, that "without a contract purely maritime in its nature, the obligation is not enforceable in the admiralty."

In *French Republic* v. *Fahey*, D. C. Md., 278 Fed. 947, 949, the Court held that:

> ". . . an original nonmaritime contract of purchase and sale does not become maritime merely because the buyer may be entitled to recover from the seller a sum which it had to pay because the default of the sellers in their nonmaritime undertaking caused it, in its turn, to break a maritime engagement."

In *Yone Suzuki* v. *Central Argentine Ry.*, 2 Cir., 27 F. 2d 795, 807, cert. denied 278 U. S. 652, the Second Circuit Court of Appeals, by a different panel, rejecting a claim over against a consignor based on the original contract which provided for sale and delivery of coal, because it was not a maritime contract, said:

> "But the agreements to maintain an interval of ten days between each steamer and to deliver the coal on land were nonmaritime, and cannot be enforced in admiralty, either directly or by remedy over under the fifty-sixth rule. *The Alert (Soderberg* v. *Atlantic Lighterage Corp.)* (C. C. A.) 19 F. (2d) 286; *The Ada* (C. C. A.) 250 F. 194."

In the *Navigadora No. 73, supra*, 45 F. 2d 639, the libel claimed damage to a tank barge from grounding at an unsafe berth caused by a buyer's failure to furnish a free and safe berth as agreed, where:

> "The original contract herein was one for the sale of molasses . . . and, among the provisions of said contract . . . was one to the general effect that the Dunbar Molasses Company would make deliveries of

molasses in ten approximately equal monthly instalments at the wharf of the New Jersey Alcohol & Chemical Company; that the molasses would be delivered in barges, for which barges the New Jersey Alcohol & Chemical Company agreed to have ready upon their arrival free and safe wharfage, at buyer's account."

The Court dismissed the libel for lack of admiralty jurisdiction upon the ground that the contract was not a maritime contract, citing *The Ada*, 250 Fed. 194, *supra*.

Under the foregoing authorities it is submitted that, even without consideration being given to the "Special Conditions" contained in Purchase Order No. 1970 and alike in Purchase Order No. 1971, the contract of your petitioner upon which it has been held liable herein was not a maritime contract, and the Court's exercise of admiralty jurisdiction to hold your petitioner liable as for breach thereof is in conflict with the decisions above cited, and violates Art. III, Sec. 2, cl. 3 of the United States Constitution and 28 U. S. C. § 1333 prescribing the admiralty and maritime jurisdiction.

But this is rendered the more emphatic and of special importance by reason of the "Special Conditions" of both parts of the purchase order contract and the incorporation therein of the Revised American Foreign Trade Definitions —1941.*

Your petitioner's contract consists of the two complementary parts, "Complementary" Purchase Order No. 1970 and "Complementary" Purchase Order No. 1971, both containing "Special Conditions" reciting that they are "placed in accordance with *the offer* made" (i.e. one offer).

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* One reading the Court of Appeals' opinion would not even know that the contract contained the "Special Conditions". Compare the Court's statement that "The only other clause . . . that needs to be mentioned" is the one respecting possible lightering at Recalada.

by an agent on behalf of the two named corporations; that each Purchase Order reciprocally is "an integral part in all effects and results" with the other; and that (as worded in No. 1971):

> "This special conditions means that the total purchase of 7 (seven) cargoes from Paragon Oil Co., Inc. purchase order NY-1970, CCCB# (to be indicated) and the necessary transportation from Republic Tankers purchase order NY-1971, CCCB# to be indicated, makes only one indivisible intransferable C & F (cost and freight) purchase order as per the definition of the 'Revised American Foreign Trade' definition 1941 adopted July 30, 1951 by a Joint Committee representing the Chamber of Commerce of the United States of America, National Council of American Imports Inc., and National Foreign Trade Council, Inc. in all respects which may concern Y. P. F. regarding responsibilities, liabilities and rights, without any other strings, exceptions or additions.
>
> "The beneficiaries of the purchase order NY-1971 and purchase order NY-1970 fully agree with these conditions."

The Statement by the Court of Appeals that "Republic's liability to Paragon and YPF's to Republic was *that assumed by a charterer*" (*infra*, p. 7a) is in contradiction of the specific provision at the very end of the Purchase Order No. 1971 that:

> "The word Charterers do *not* mean that Yacimientos Petroliferos Fiscales had chartered any ships, in view of the fact that *Purchase Orders NY-1970 and NY-1971 are only one order with condition C & F*, as shown in the corresponding Purchase Orders. Any reference to Charter Party and Charterers are to the *only* effect to facilitate the wording of *these Purchase Orders C & F*". (Italics ours).

This Court appears never to have reviewed the Revised American Foreign Trade Definitions—1941, or any contract by which the parties agreed that their contract is one as per

such Revised Definitions, to determine whether the same is a contract of purchase and sale and not a maritime contract for breach of which a court of admiralty can exercise substantive jurisdiction; and the wide use of such Revised Definitions by contractors, coupled with the above noted conflict of the decision herein with prior decisions, make it of special importance that the question be reviewed by this Court herein.

As set forth in the Foreword to the Revised American Foreign Trade Definitions—1941 (See pamphlet copy submitted), many changes in practice had occurred since the issuance in 1919 of a prior set of American Foreign Trade Definitions; "The 1919 Definitions did much to clarify and simplify foreign trade practice, and *received recognition and use by buyers and sellers throughout the world*"; but "At the Twenty-Seventh National Foreign Trade Convention, 1940, further revision and clarification of these Definitions was urged as necessary to assist the foreign trader in the handling of his transactions." Stating that the Revised definitions "are recommended for general use by both exporters and importers", the Foreword further states:

> "These revised definitions have no status at law unless there is specific legislation providing for them, or unless they are confirmed by court decisions. Hence, it is suggested that sellers and buyers agree to their acceptance as part of the contract of sale. These revised definitions will then become legally binding upon all parties.
>
> "... Widespread acceptance will lead to a greater standardization of foreign trade procedure, and to the avoidance of much misunderstanding."

Under General Notes of Caution it is stated that "it is important that sellers and buyers agree that their contracts are subject to the Revised American Foreign Trade Definitions—1941 and that the various points listed are accepted by both parties."

These recommendations, followed by your petitioner and the two corporations in making Purchase Orders Nos. 1970 and 1971, have been followed by your petitioner in making many other large purchase orders in the United States containing similar specific agreement that they are made as per a definition in the Revised American Foreign Trade Definitions—1941. And your petitioner believes that, to a greater extent even than the preceding 1919 Definitions during the 21 years preceding the revision, the 1941 Revised Definitions during the 21 years since their adoption have "received wide recognition and use by buyers and sellers throughout the world", and particularly in the ever increasing foreign trade of the United States.

This Court has held that "The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action" (*Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 203). And, of course, the very guaranty by the Seventh Amendment of a right of trial by jury in suits at common law is based on recognition of that principle.

It is, therefore, of special importance to American foreign trade and to "buyers and sellers throughout the world" that this Court determine the nature of such a contract as maritime or non-maritime and the jurisdictional question with particular reference to the fact that by their contract the parties expressly agreed that it was an indivisible intransferable C & F (cost and freight) contract as per the definition in the Revised American Foreign Trade Definitions—1941.

II

The March 16, 1957 "Charter Party" between libellant and Republic was not a real maritime contract, and, with libellant and Republic represented, as purported adversaries, by proctors from the same firm, subject to the same *Dominus litis*, the exercise of jurisdiction between them violates Art. III, § 2 of the Constitution, conflicts with decisions of this Court, and has been employed so as to defeat the significance and value of the Revised American Foreign Trade Definitions—1941.

The exercise of admiralty jurisdiction herein to make a decree that the respondent Republic Tankers, S. A. is "liable" to libellant is violative of Art. III, Sec. 2 of the United States Constitution and 28 U. S. C. § 1333, and conflicts with decisions of this Court in two respects. First, contrary to their pleadings, the "suit" between them was not actually adversary, involved no actual controversy between them, and the judgment sought and obtained was not, as their pleadings represented, one for enforcement by libellant against such respondent, but one intended only for use by the two against your petitioner; and second, the March 16, 1957 purported charter party between them was not a real maritime contract but a device for having two corporations of the same ownership attempt to divide between themselves the "indivisible" and "intransferable" contract of your petitioner and to substitute for the non-maritime "C & F (cost and freight) purchase order" binding Republic Tankers, S. A. and your petitioner a purported maritime contract between Republic Tankers, S. A. and libellant.

The existence of an "actual controversy" between parties pleading as adversaries is essential to the exercise of the judicial power and if there is no "actual controversy" between two such parties "there is a fatal constitutional, as well as statutory defect because of the manner in which

the judicial power is defined by Art. III, § 2, cl. 1, of the Constitution. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227" (*California Comm.* v. *United States*, 355 U. S. 534, 536); "the usual safeguards of adversary proceedings must be observed" (*Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575, 580). Where in form a money judgment is sought, but is to be paid only from a fund to be provided therefor, there is no "case" or "controversy" within the Constitutional provision; "The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it" (*Gordon* v. *United States*, 117 U. S. 697, 698).* Even as respects declaratory or injunctive relief, if there has been agreement by a prosecutor not to prosecute if the determination be that such prosecution will lie, this will defeat the exercise of jurisdiction (*Poe* v. *Ullman*, 367 U. S. 495, 507). When the action is in form adversary, it must in fact be "the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process" (*United States* v. *Johnson*, 319 U. S. 302, 305). Even statutory assignment of a cause of action will be construed as ineffective when the same insurance carrier (Traveler's Insurance Co.) insured both parties and "an action by Travelers would, in effect, be an action against itself" (*Czaplicki* v. *SS. Hoegh Silvercloud*, 351 U. S. 521). Jurisdiction will not be exercised where nominally adverse parties are controlled by

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* In the notable exception of interpleader cases (not to be confused with impleading petitions) it is essential, both here and in England, that the complainant show that he "has no interest in the subject matter of the suit" (*Killian* v. *Ebbinghaus*, 110 U. S. 568, 571; *Groves* v. *Scatell*, 153 U. S. 465, 485; *Sanders* v. *Fertilizer Works*, 292 U. S. 190, 200; *Treinies* v. *Sunshine Min. Co.*, 308 U. S. 66, 72; 18 Halsburry's Laws of England, 2d Ed., "Interpleader", p. 611; 22 Halsburry's Laws of England, 3d Ed., "Interpleader" p. 467; *Murietta* v. *South American &c. Company, Ltd.*, (1893) 62 L. J. (Q. B.) 396; *Belcher* v. *Smith*, 9 Bing. 82, 131 Eng. Reprint 545). In the *Murietta* case the Court said that "Colluding may be said to be an equivalent for playing the same game."

the same *dominus litis* (*South Spring Gold Co.* v. *Amador Medean Gold Mining Co.*, 145 U. S. 300, 301; *East Tennessee Virginia & Georgia RR Co.* v. *Southern Telegraph Co.*, 125 U. S. 695; *Little* v. *Bowers*, 134 U. S. 547, 558; *Mills* v. *Green*, 159 U. S. 651, 653; *Wood Paper Co.* v. *Heft*, 8 Wall. (75 U. S.) 333; *Cleveland* v. *Chamberlain*, 1 Black (66 U. S.) 419, 426; *Lord* v. *Veazie*, 8 How. (49 U. S.) 251, 255; *Gardner* v. *Goodyear Dental Vulcanite Co.*, 131 U. S. App. CIII, but published in 21 L. Ed. 141). The fact that counsel for nominally opposing parties are paid by the same interests will require dismissal (*Gardner* v. *Goodyear Dental Vulcanite Co.*, *supra*, 21 L. Ed. 141; *Wood* v. *Nesbitt*, 19 N. Y. Supp. 423; *Judson* v. *Flushing Jockey Club*, 14 Misc. 350 and 562, 36 N. Y. Supp. 126 and 128).

In their brief in the Court of Appeals, libellant's proctors acknowledged that the prime issue "simply could not form any basis for a real conflict between Appellees Paragon and Republic." The brief for Republic in the Court of Appeals stated that "It pitted Paragon against YPF, with Republic occupying only a nominal role. Paragon had two strings to its bow."

This shows that the case as between libellant and Republic is of the character which this Court held could not support a judgment in *Gordon* v. *United States*, *supra*, 117 U. S. 697, 698, and *Poe* v. *Ullman*, 367 U. S. 495, 507. For it shows, together with the fact that the two corporations are owned by the same Schwartz brothers, that there is not and was not either intention to enforce by execution a judgment for libellant against Republic Tankers, S. A. in the absence of judgment for the latter against your petitioner, nor any motive or reason for doing so. Rather, the objective of the two was to have judgment rendered for libellant against Republic simply as a 'string to the bow' of libellant, and to be satisfied only by the proceeds of any judgment Republic might be enabled to obtain against your petitioner. "Plainly, therefore," they "are, colloquially speaking, partners in litigation" (*Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 74). See also *Quincy* v. *Steel*, 120 U. S. 241, 249.

This, however, is directly contrary to their pleadings which pitted Paragon and Republic against each other as

adversaries represented by differently named proctors and with the libel verified by B. D. Schwartz (Vol. 1, A37) and every pleading of Republic verified by Mr. Gilchrist as Proctor (Vol. 1, A50, A60, A75), although the same B. D. Schwartz was an officer of Republic, and Mr. Gilchrist was an employee of libellant's proctors. By its Answer, Republic "prays that the libel herein be dismissed as against it with costs" (Vol. 1, A49). In reality, however, it desired judgment to be rendered for libellant against it, and now affirmatively seeks to have the judgment for libellant against it sustained.

In *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 247, this Court said: "Truth needs no disguise."

If, indeed, Republic was to act as a mere 'string to the bow' of Paragon, both its own pleadings and Paragon's pleadings should have so alleged. They then would have been pitted as co-libellants against your petitioner, and no judgment would have been sought by libellant against Republic. (Cf. discussion of the artificial alignment of parties in *Mitchell* v. *Maurer*, 293 U. S. 237, 242). The suit necessarily would have been one solely against your petitioner and based on the indivisible intransferable C & F (cost and freight) purchase order of your petitioner. Every item of evidence offered (e. g. the alleged March 16, 1957 "charter party", Libellant's Ex. 1) would have been clearly subject to objection by your petitioner, and would have required proof thereof, as distinct from being admitted into the record because Mr. Gilchrist made no objection or by Republic's pleadings "admitted" or himself alleged its execution.

Under the foregoing authorities, therefore, even if the question of "collusion" or the lack of any "actual controversy" between libellant and Republic involved this and nothing more, the rendering of a decree herein in favor of libellant against Republic would involve "a fatal constitutional, as well as statutory defect because of the manner in which the judicial power is defined by Art. III, § 2, cl. 1, of

the Constitution" (*California Comm.* v. *United States, supra,* 355 U. S. 534, 536), which definition includes "*Cases* of admiralty and maritime Jurisdiction." Prejudice to your petitioner would result from the fact that the sanctity of that decree for libellant against Republic is essential to the making of the second decree in favor of Republic against petitioner.

But by treating the question as abstract, and ignoring the "Special Conditions" of your petitioner's December 1956 purchase order, while reciting that "At the time the tanker *was under* a voyage charter to Republic, which *in turn* had entered into a contract of affreightment with YPF", the Court of Appeals has misapprehended the jurisdictional question presented by reason of the extraordinary steps which actually were taken by closely affiliated corporations (of the same ownership, and what the Court of Appeals called "the congeries of Schwartz-owned corporations") *after* two of them made their "indivisible intransferable C & F (cost and freight) purchase order" contract with your petitioner.

For *after* two of the corporations had first "fully agreed" with your petitioner in writing by the December 1956 purchase orders that "the total purchase" of the seven cargoes of oil *and the necessary transportation* "makes only one indivisible intransferable C & F (cost and freight) purchase order as per the definition of the Revised American Foreign Trade Definitions—1941", one of them and a third affiliate (of the same ownership) made, or claim they made, between themselves, as of March 16, 195., a purported maritime contract, viz., a purported charter party for simple affreightment and discharge at Buenos Aires of one cargo of "Bunker 'C' Fuel Oil"—without reference whatever to the seven cargo purchase, the guaranty specifications, the special conditions, the Revised Definitions, or the other terms and conditions of the December 1956 indivisible intransferable C & F (cost and freight) purchase order, and at a freight rate approximately 38.9%

and a demurrage rate approximately 55% of the rates paid by petitioner under the December 1956 purchase order. (Cf. *Great Northern Ry.* v. *O'Connor,* 232 U. S. 508, 514-515; *Chicago Milwaukee St. P. & Pac. RR Co.* v. *Acme Fast Freight,* 336 U. S. 465, 484-485; *Schmaling* v. *Thomlinson,* 6 Taunt. 147, 128 E. Reprint 989, (and *Cull* v. *Backhouse* there summarized) cited in *Boston Ice Company* v. *Potter,* 123 Mass. 28, 30, which is cited in *Arkansas Smelting Co.* v. *Belden Co.,* 127 U. S. 379, 387).

If this can be done as here, with a purported "charter party" between two corporations of the same ownership, and by admiralty proceedings in which the charterer as a purported adversary respondent is represented by a proctor from the firm representing the libellant, then a means will have been established of contractors destroying the significance and value to buyers in American foreign trade of the use of the Revised American Foreign Trade Definitions—1941, and this without any actual cost, loss, liability or risk being occasioned to the contractor in doing so. The same owner of two corporations can have one corporation first "fully agree" to an indivisible intransferable C & F (cost and freight) purchase order as per the Revised American Foreign Trade Definitions—1941, and then effect an immediate destruction of the value of that agreement to the buyer by having the second corporation make a "charter party" with the first one without any reference whatever to the Revised American Foreign Trade Definitions—1941. Then, whatever the circumstances of any damage that may occur, the one corporation can "sue" the other in admiralty and, by proctors from the same firm, the two can effectively cooperate to have the "charterer" held "liable" to the libellant for breach of the charter, but insist that a claim for "indemnity" from the buyer be determined in admiralty.

As between the two corporations of the same ownership it would make no difference what freight, demurrage or other division was made between them of the sums which the

buyer was obliged to pay; whether they made it a small or a large fraction or the equivalent of the sums payable by the buyer would involve in reality simply transferring it from one pocket to another. They could, in fact, as they did here, withhold any information of the "charter", and bring it forth only in case an advantage would be served against someone else. Indeed, if the method of introducing it in evidence here used be approved, with no one being obliged to prove its execution, it could be created for their convenience after the need arose. (The form itself even reads "made *as of* March 16, 1957".) And as respects the "suit" and "trial" itself, there would never be any real issue or doubt between them, since proctors from the same office would be intent from the beginning on having a judgment entered for the libellant.

Instead of the Revised American Foreign Trade Definitions—1941 becoming by agreement "legally binding upon all parties", they would bind the seller only at will, and only until he chose to make with a dummy a pretended "charter party" without reference to the Revised Definitions. Instead of their leading "to the avoidance of much misunderstanding", they would become the cause of great misunderstanding. Instead of serving "to assist the foreign trader in the handling of his transactions", the Definitions would increase his difficulties. Buyers "throughout the world", accustomed to use the Revised Definitions with confidence, would have that confidence shattered. (Cf. Foreword to Revised Definitions).

As respects the contract as well as the suit, even apart from Constitutional and jurisdictional provisions, "It is, then, only an evasion of the rights of the" buyer "and presents a facility to evasion, which ought not to be encouraged" (*Gracie* v. *Palmer*, 8 Wheat. (21 U. S.) 604, 638).

Moreover, "Collusion to satisfy the jurisdictional requirements of the District Court may, of course, always be shown; and it will always defeat jurisdiction" (*Smith* v. *Sperling*, 354 U. S. 91, 97).

III

The decree for libellant against Republic is collusive and void and cannot support the decree for Republic against petitioner; both decrees should be vacated; and review by this Court is important to the administration of justice and to American foreign trade.

The Court of Appeals has recognized that Republic was "going through what was only a form.", but states that: "As against this, the Court was not deceived as to the course Republic was taking, Republic's abstentionist position having been plain from the beginning, and it is hard to see that YPF suffered any prejudice thereby. YPF knew about the nature of the representation of Republic from the outset of the litigation . . ." (*Infra*, p. 10a)

Factually, this is clearly erroneous; but it also conflicts with decisions of this Court, as to the duty of a Court upon being informed of the collusive nature of any proceeding. Assuming that "the Court was not deceived", it was the Court's duty to dismiss the proceedings between libellant and Republic as soon as it became known that they were represented by attorneys from the same office, under domination of the same *dominus litis*. In *Gardner* v. *Goodyear Dental Vulcanite Co.*, *supra*, 21 L. Ed. 141, this Court, after pointing out that:

> "The company, however, paid the counsel employed by the defense as well as for themselves in the district court, and subsequently in this court";

said that:

> "These are the only facts which we think it necessary to notice."

In *United States* v. *Johnson*, *supra*, 319 U. S. 302, 305, this Court said of the fact that there was no independent selection of counsel:

> "Such a suit is collusive because it is not in any real sense adversary. It does not assume the 'honest

and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process".

As respects Judge Friendly's statement that "the Court was not deceived", your petitioner and petitioner's counsel, of course, cannot know what the Court may have realized from the beginning; but if, indeed, "the Court was not deceived", then the Court must have realized that process and pleadings of both libellant and Republic had been carefully designed to make apparent in "form" an adversary controversy where none in fact existed, a maritime character and admiralty jurisdiction of subject matter which in fact was lacking, and a purported purpose to obtain and enforce by execution a decree in favor of libellant against Republic, or in favor of Republic against libellant, where in fact no such purpose existed. Unless the *Gardner* case is to be overruled, "These are the only facts . . . necessary to notice."

The rule in collusion cases is not that discovery of the collusion renders it legal; but that discovery of the collusion requires dismissal.

The Court's recital that "YPF knew about the nature of the representation of Republic from the outset of the litigation" simply is not the fact; and the docket entries and pleadings establish the contrary.

The libel (Vol. I, A33), verified by B. D. Schwartz as treasurer of libellant (Id. A37), was filed May 16, 1958 by Hill Betts & Nash (now Hill Betts Yamaoka Freehill & Longcope) as proctors for libellant. It claimed adversely against Republic as well as against your petitioner; alleging a March 16, 1957 charter of the vessel by libellant to Republic, that it contained a safe berth clause, and "Eighth: *Respondents Republic Tankers, S. A.* and Yacimientos Petroliferos Fiscales, S. A. failed to furnish a safe berth . . . but on the contrary furnished it with an unsafe berth resulting in the damage aforesaid." It did

not disclose the fact that libellant and Republic were of common ownership, with the same *dominus litis*, but on the contrary alleged "the Admiralty and maritime jurisdiction of the United States and of this Honorable Court" (Id. A34), a matter put in issue by your petitioner's Answer (Id. A39), and necessarily dependent on a real maritime contract and a real adversary proceeding.

The libel yed citation and decree against both YPF and Repub' (Id. A36). However, the Docket shows that a citation w s issued only to YPF, and YPF alone was served May 29, 1958 (Id. A1); that YPF appeared June 23, 1958, and filed Answer and Exceptions July 21, 1958 (Id. A1). Thereafter—in other words, following the submission by YPF to jurisdiction on the pleadings filed—on September 16, 1958 Republic, although never cited, appeared by David I. Gilchrist, Esq., as proctor (Id. A2) and filed an Answer verified by him as proctor—although the motion papers filed in the Court of Appeals disclose that B. D. Schwartz was an officer of Republic (*Infra*, p. 25a). Mr. Gilchrist also verified Republic's other pleadings, alleging each time as "the reason" for this that Republic "is a foreign corporation" (Id. A50, A60, A75), when he knew that, while it was a Panama corporation (organized at the Panama consulate in New York), its real principal office and all of its officers resided in New York City. It was not until the first motion to implead had been noticed that petitioner's counsel first discovered and called "the Court's attention" to the fact that Mr. Gilchrist was an employee of Hill, Betts & Nash (Id. 61). It was not until after the conclusion of the trial and while the appeal was pending in the Court of Appeals that petitioner's counsel learned that libellant and Republic were of common ownership (*Infra*, p. 24a) Even now, libellant and Republic have neither admitted nor denied these facts.

These pleadings and tactics are from one of the oldest admiralty firms in the country, and naturally, if approved, will be followed by less experienced proctors as models.

IV

To hold petitioner liable under the December 1956 indivisible intransferable C & F (cost and freight) purchase order, because Republic made and breached a purported March 16, 1957 "Charter Party" with libellant, violates the December 1956 purchase order, the Revised Definitions, which are part thereof, and conflicts with decisions establishing that as independent contractors neither libellant nor Republic can claim against petitioner under the December 1956 contract.

This Court and other courts have uniformly held that, as stated in *Arkansas Smelting Co.* v. *Belden Co.*, 127 U. S. 379, 387:

> "But everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipated from the character, credit and substance of the party with whom you contract'."

The Court cited and quoted from *Boston Ice Co.* v. *Potter*, 123 Mass. 28, 30, stating:

> "'In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into.'"

The Massachusetts Court cited and summarized as follows *Schmaling* v. *Thomlinson*, 6 Taunt. 147, 128 Eng. Reprint 989:

> "A firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without privity of the defendants, and it was held that he could not recover compensation for his services from the defendants."

It was sought by counsel in the English court to distinguish *Call* v. *Backhouse* where the other was employed by the contractor "to do only a part of the business which the defendant had commissioned the prime agent to perform." The Court refused to make any such distinction.

The differences between the terms of petitioner's December 1956 contract and the purported March 16, 1957 "charter party" between libellant and Republic are so great that the latter cannot be related even remotely to the former except as an independent contract of libellant and Republic between themselves alone. It is restricted to the one voyage and one cargo—in contrast to the seven cargoes provided in the December 1956 contract. It purports to be maritime instead of C & F. It contains no reference to the December 1956 contract nor to any of the "Guaranty Specifications" set forth in the indivisible December 1956 contract. In contrast to the large freight and demurrage rates specified in the December 1956 contract, it prescribes much smaller rates payable by Republic to libellant. The December 1956 contract incorporated par. "28. Liberty Clauses" from a charter form, giving the master broad discretion respecting entering port. In contrast "Those provisions were industriously left out of the charter party" by libellant and Republic (Cf. *Culliford* v. *Gomila*, 128 U. S. 135, 358). Also eliminated from the "charter party" is clause 27 covering "Assignment."

Hence, "There is nothing in the contract which shows that it was made in any particular for the benefit of" your petitioner (Cf. *Hennessy* v. *Bond*, 9 Cir., 77 Fed. 403, 405); and "the agreement was not of the character" petitioner stipulated for (*Bailey* v. *Bond*, 9 Cir., 77 Fed. 406, 410).

In *Union Stock Yards Co.* v. *Chicago &c R. R. Co.*, 196 U. S. 217, 226, the railroad was required by contract with the terminal company to inspect cars, and the terminal owed the same duty to its employees. This Court held, accordingly, that the terminal company upon being held

liable could not have restitution from the railroad company, saying:

> "It may be conceded that the railroad company, having a contract with the terminal company . . . a discharge of this duty required an inspection of the cars by the railroad company upon delivery to the terminal company. But that the terminal company owed a similar duty to its employees and neglected to perform the same to the injury of an employee, has been established."

But here the only undertaking toward libellant was that of Republic; and it did not even purport by its provisions to undertake instead that *petitioner* would take care of the vessel, nor did it afford any means for petitioner to do so. No communication was had from the vessel to petitioner, nor from petitioner to the vessel (vol. 1, A104); and your petitioner was never given any notice of readiness until the vessel already was aground. It was not notified of the vessel's arrival at Interseccion. *The master was functioning under and in accordance with the charter party; and did not even have available petitioner's purchase order contract*, testifying that he did not see it until in Court (vol. 1, A107). He looked solely to Republic's agent, i.e., the ship's agent, and to the "charter party" between libellant and Republic as defining his own and such agent's authority. He took the instructions or advice of the agent Milanowski and of the special pilot Camerata placed on board at Intersection by Milanowski's instruction. Milanowski in turn was exercising all the authority afforded him by the charter party, rather than the more limited authority afforded him by the purchase order contract. *Until after the vessel had grounded, both Milanowski and the master were functioning under the independent contract between Republic and libellant.*

As said in *Cory Bros. & Co.* v. *United States*, 2 Cir., 51 F. 2d 1010, 1013-1014:

> "The risks of the independent contractor's business are his own."

In *The Hamburg*, 2 Cir., 204 Fed. 590, 591-592, the Court held that the DeMayo Company "was an independent contractor" and, having been held liable, could have no indemnity or claim over: "It cannot claim indemnity from the Hamburg Line for its own negligence in doing the work it undertook."

Having a contract with your petitioner for the extraordinarily large freight and demurrage rates, it would have been a gross betrayal of petitioner for Republic to hire another at a fraction of that amount, if Republic were acting in any sense as your petitioner's agent. It is, in fact, *only* as one by which Republic was contracting independently as the principal that the "charter party" between Republic and libellant can be justified. And if Republic chose independently to have another act in Republic's place, to Republic's great profit, Republic thereby assumed fully the obligation to perform any undertakings it made to that other. Republic's undertakings to your petitioner were its own; and Republic's undertakings to libellant by its later independent contract were its own (Cf. *Davidson* v. *Madison Corp.*, 257 N. Y. 120, 125; *Eisenbach* v. *Gimbel Bros.*, 281 N. Y. 474).

It is, petitioner submits, clearly erroneous and erroneous as matter of law for the Court of Appeals to hold that the captain "had a right to rely on the 'express assurance' of the Affreightment Contract;" since his own testimony shows that he did not know of its existence.

The case of *Cities Service Transp. Co.* v. *Gulf Ref. Co.*, 2 Cir., 79 F. 2d 521, cited by the Court of Appeals, and similar cases cited by the District Court, are of an opposite nature to the present one. They involve cases where *after* a charter contract containing a safe berth clause, a subcharterer or consignee, by subcharter or bill of lading, then undertakes to perform that obligation instead of the charterer performing it. The Court of Appeals also misapplies *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 428, and *Waterman S. S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U. S. 421,

423-425, where a stevedoring company, contracting to unload a vessel, is obliged to do so in workmanlike manner, and will be liable over to a shipowner for "bringing 'into play the unseaworthy condition of the vessel'," (358 U. S. 426, 429). If the "bringing into play" has application here, it would establish liability of Republic to indemnify petitioner if there were any basis for liability of petitioner to libellant. For it was Republic's own independent contract with libellant which would be analogous to the stevedoring contract in those cases, with Republic obliged, upon executing the March 16, 1957 "charter party" with libellant, to carry out itself the obligations it thereby undertook.

To hold otherwise is again, in this respect also, to destroy the usefulness and value of the Revised American Foreign Trade Definitions—1941, by enabling a contractor such as Republic to first make a non-maritime "indivisible intransferable C & F (Cost and Freight) purchase order" contract with a buyer, and then immediately deprive the buyer of the advantages thereof by making an actual or purported maritime contract with an affiliate or third party. This question also is of great importance to "buyers and sellers throughout the world."

V

To allow the "charter party" in evidence, without any proof of its execution, or of authority of libellant from the owner to execute it, was highly prejudicial to petitioner.

At start of the trial, without a word of proof, the purported "charter party" of March 16, 1957 was offered and admitted, over your petitioner's objection, and with the Court stating: "The effect against YPF will have to be determined" (Vol. I, A92). There is nothing in *The Winkfield*, L. R. (1902), P. 42, cited by the Court of Appeals to justify this. *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303, cited apparently with disapproval the *Winkfield*

case as respects a charterer's right to claim damage to a vessel.

But the Court of Appeals herein has failed to note that a principal contention of your petitioner was that it should not have been admitted at all.

Charter rights have to be proved, and "*This burden is heavy,*" for courts are reluctant to find a demise when the dealings between the parties are consistent with any lesser relationship (*Guzman* v. *Pichirillo*, 369 U. S. 698; ital. ours). Here, there was no proof who was owner, nor that libellant had any rights from such owner, nor even that the March 16, 1957 "Charter" was executed.

Its admission illustrates the dual and inconsistent roles Republic and Mr. Gilchrist, as its proctor, were permitted to play. It is only by treating Republic as a real adversary of libellant that any basis for its admission can be suggested, i.e., the lack of objection by Mr. Gilchrist, and his having alleged its existence in his pleadings. This is not an "abstentionist position"; and it deprived petitioner of the opportunity of cross-examination of any witness who might be produced to prove the fact, time and circumstances of its execution; and that it was never intended to establish a real contract relationship between the two, but as a device for changing, without your petitioner's consent or knowledge, the rights of your petitioner under the "indivisible intransferable C & F (cost and freight) purchase order" contract.

It is important to "buyers and sellers throughout the world" to determine whether this pattern can be followed when a buyer is sued on his C & F contract.

VI

The decision conflicts with decisions establishing that a safe berth clause is not an abstract warranty, but always relative to the knowledge of risk by the party with whom it is made, and the nature of the contract; and with proximate cause decisions.

The Court of Appeals treats "Paragon's case against Republic and Republic's against YPF" as identical and rested on the simple proposition that "A place to which the Greenpoint could proceed and from which she could depart 'always safely afloat' was warranted; it was not provided; therefore the warranty was breached and the warrantor was liable for the resulting damage."

Actually, libellant's own evidence established that the vessel could proceed thereto and depart therefrom always afloat, although not at every hour of every day. The harbor is a notoriously tidal one (Findings 19 and 20, Vol. I, A. 18), and Judge Levet found that:

> "19. The condition of the wind and the tide existing at the time of the vessel's arrival determine whether lighterage is required *at Intersection.*"

Undertakings as to safe harbors or berth must be interpreted with reference to this fact (*Parker* v. *Winslow*, 7 El & Bl 942, 119 Reprint 1497; *Carlton SS Co.* v. *Castle Mail Packaging Co.*, (1898) A. C. 486, affg. (1897) 2 Q. B. 485). This Court held in *Morgan* v. *United States*, 14 Wall (81 U. S.) 535, *Leroy* v. *United States*, 14 Wall (81 U. S.) 607, and *New Orleans-Belize Mail & Central American SS Co.* v. *United States*, 239 U. S. 202, 206, that the risk of stranding when high wind and low stage of water are encountered, or of collision with a sunken anchor in the harbor, is "an ordinary risk which every vessel must run that enters a harbor".

In *Panama Railroad Co.* v. *Napier Shipping Co.*, 166 U. S. 280, 288, distinguishing cases where "the respondent has been held liable, upon the theory that it was his duty to furnish a safe berth", this Court held:

> "This test is manifestly inapplicable where the agent of the vessel is already acquainted with the danger, and assumes the responsibility of providing her with a safe birth."

Here, when Republic and libellant executed the March 16, 1957 "charter party", Republic and its ship's agent Milanowski, were fully acquainted with the harbor. Republic had, indeed, already delivered two of the seven cargoes. And the basis of any liability of Republic to libellant necessarily is that by the March 16, 1957 charter party Republic assumed the responsibility of providing her with a safe berth.

Both Milanowski and Camerata knew also that the berth which was to be used was presently occupied by an Esso barge; and that the berth would not be available until the barge left.

It was erroneous as matter of law and clearly erroneous factually for the Court of Appeals to hold that Milanowski "was entitled to rely" on a "clear implication that the berth would be available the next day." He was neither entitled to nor did he impute such an assurance to your petitioner.

Milanowski knew that your petitioner could not give assurance that the barge would leave; indeed, what he wanted was "confirmation *from Esso* that the berth would be free" (Vol. I, A 145). Of similar facts in *The Calliope*, (1891) A. C. 11, 17, Lord Halsbury said:

> "In the first place it discloses an absolute intention not to rely upon any 'order' supposed to have been given to them, and in the second place it also shows that they knew that the operation was one which was attended with danger".

This Court cited both *The Calliope* and *Panama R. R. Co.* v. *Napier Shipping Co., supra,* in *Smith* v. *Burnett,* 173 U. S. 430, 435, and at p. 433 said:

> "At the same time the master is bound to use ordinary care, and cannot carelessly run into danger."

This is all in accord with the rule stated in I *Sedgwick on Damages*, 9th Ed. § 205, p. 390, that:

> "Where damages are claimed, not for the direct injury, that is, the loss of the value of the contract itself, but for a consequential loss, the plaintiff cannot recover for such loss if he might reasonably have avoided it."

In *Bear Cat Mining Co.* v. *Grasselli Chemical Co.*, 8 Cir., 247 Fed. 286, a lessee sued a sublessee who had breached the sublease, occasioning a breach of the lease, by a flooding of the mine, and the Court held that it was necessary for the plaintiff to do everything necessary to protect the leasehold, and, citing *Warren* v. *Stoddart*, 105 U. S. 224, held the damage, if any, was clearly consequential, and that:

> "But the damages which the plaintiff is in fact seeking to recover are not the direct result of defendant's violation of the sublease, but are more properly referable to plaintiff's violation of his own lease with the owner of the mine" (247 Fed. 288).

Here, the very ground of libellant's recovery against Republic is Republic's own violation of its own March 16, 1957 contract with libellant (if it be sustained as a contract); and it was by the direct action of Milanowski and Camerata and the master that this occurred.

It was repeatedly testified by Milanowski and Camerata that the place where it customarily was determined whether to lighter the vessel was Interseccion or The Roads (Vol. I, A127, 129, 131, 156, 157, 158, 161). Your petitioner, however, was never notified that the vessel arrived at Interseccion or The Roads; and a representative of your petitioner reported at Boca on the morning of the 17th pur-

suant to instructions of Milanowski that they would go out to the roads to arrange free pratique for lightering there (Vol. I, A132).

It would have been a simple matter for either Camerata or the master to communicate with Milanowski to ascertain if the berth was free, or for him to communicate with them to report that it was still occupied (*The Convoy Wheat*, 3 Wall. (70 U. S.) 225, 230; *U. S. Trucking Corp.* v. *City of New York*, 2 Cir., 18 F. 2d 775).

In Milanowski's message of the 15th to the captain, only part of which is quoted by Judge Friendly (*infra*, p. 5a), he had instructed the captain: "Keep closely advised" (Vol. 1, A128).

The Court of Appeals reasons that it was necessary for petitioner to show that Milanowski knew that "*on no account* would Berth C be available on the Greenpoint's arrival there" or that the captain allowed the pilots to navigate the Greenpoint "to a berth *he knew* would be filled" (p. 7a-8a *infra*).

This, however, would substitute *certainty of disaster* for *risk of danger*, and destroy utterly the rule of reasonable care. Milanowski, Camerata and the master *all knew the Esso barge was there and that the berth would not be clear until it had departed.* Like the starting of the fireboat without first checking to be sure the lines were cast off in *Trapp* v. *McClellan*, 68 App. Div. 362, 74 N. Y. Supp. 130, here the proximate cause, the *causa causans* of the grounding, was the Greenpoint's proceeding from Interseccion without first checking to be sure the berth was available.

Both Milanowski and the master, and indeed all the Schwartz' interests, were eager for quick entrance, discharge and departure, for the tankers were at a great premium due to the Suez Canal crisis; and their eagerness for haste caused them to disregard the simplest precautions —a feature which both the District Court and the Circuit Court of Appeals overlooked.

"Only the clearest requirement to do something which is dangerous can relieve the contractor from the exercise of ordinary prudence" (*The Robert R.*, 2 Cir., 255 Fed. 37, 40). "The law will not permit him to throw a loss, resulting from a damage to himself, upon another, arising from causes for which the latter may be responsible, which the party sustaining the damage, might by common prudence have prevented" (*Miller* v. *Mariners' Church*, 7 Me. 51, 56, cited in *Warren* v. *Stoddart*, 105 U. S. 224, 229).

Since Milanowski had arranged the previous afternoon for all officials to meet him early on the morning of the 17th to go out to Interseccion, it was gross negligence of him not to inform Camerata or the master of this fact and his intention to lighter at Interseccion, either on the afternoon of the 16th when this was arranged or at the latest very early on the 17th. And it was grossly negligent of Camerata and the master to leave Interseccion without checking whether the Esso barge had departed. If any of them intended to have your petitioner decide the point, it was incumbent upon them to notify your petitioner when the vessel arrived at Interseccion.

Republic not only owed on its own account any obligation it undertook to libellant by the purported March 16, 1957 "charter party"; it owed your petitioner the obligations undertaken under the "indivisible intransferable C & F (cost and freight) purchase order" of December 1956. If Republic is liable to libellant, the very grounds of such liability preclude any recovery over by Republic against your petitioner.

With an agent and master intent on hurried entrance, discharge and departure (the Suez Canal closure made tankers much in demand, and Milanowski arranged for departure papers for the 18th at the same time he arranged for officials to report to go to Interseccion, Vol. I, A139), similar questions could arise as respects any C & F purchase order made "as per the definition of the 'Revised American Foreign Trade Definitions—1941' "; and proper

determination of the questions are of importance to American foreign trade and to "buyers and sellers throughout the world" (See Foreword of the Revised Definitions).

VII

The Misinterpretation of the Exemption Clause.

The Court of Appeals does not hold as did the District Court that the provisions of the exemption clause "acts of God, fires, strikes or other *labor disturbances*, . . . or *any cause whatsoever* beyond the control of Seller or Buyer, whether or not similar to causes herein specified" are insufficient to comprehend the type of labor disturbance then existing, making it very difficult to get tugs, or the acts of the master of the Esso barge, which could not be controlled by petitioner. Instead, because the provision is that "The Seller shall not be obliged to deliver or Buyer obliged to receive said product when and while and to the extent that Buyer is prevented from receiving or disposing of it or Seller from manufacturing or making deliveries in its customary manner" by the recited causes, the Court holds that "Whatever effect this might or might not have on YPF's obligation to receive the cargo, it has none on any issue before us."

This, it is submitted, both divides the indivisible contract and also unduly emasculates the provision itself.

The Court appears to realize that the clause relates to purchase and sale—which should itself then establish that the contract is not a maritime contract.

But, in addition, your petitioner was entitled to "receive" the cargo either at Interseccion or at the berth. Either receding tide or the continued occupancy of the berth by the Esso must affect, even to controlling, whether to "receive" at least part of the cargo by lighters at Inter

seccion, by preventing its full receipt at the berth, or making it dangerous to have the vessel come in without lightering. The risks were within the language of the clause (*Larsen* v. *Sylvester*, L. R. (1908) A. C. 295; *Pyrram SS* v. *Mexican Central Ry. Co.*, 2 Cir., 169 Fed. 281; *Steamship Rutherglen Co.* v. *Howard Houlder & Partners, Inc.*, 2 Cir., 203 Fed. 848, 852). Hence, detention at Interseccion, due to any such causes, would not entail demurrage liability. The presence in the contract of this provision affected the duties of the respective parties, and certainly entitled your petitioner to notice of arrival of the vessel at Interseccion; and the acts of Camegata and the master in disregarding the known risks, and of Milanowski in failing to notify them of his intention to lighter at Interseccion, cannot deprive your petitioner of the protection which that clause contemplated. The review and determination of this question also is of importance to American foreign trade and to "buyers and sellers throughout the world".

Conclusion

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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APPENDIX

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES:

Art. III Sec. 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .—to all Cases of admiralty and maritime Jurisdiction; . . .—to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> . . . In all the . . . Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

* * *

Amendment Art. VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

28 U. S. C.:

> "1333. ADMIRALTY, MARITIME AND PRIZE CASES. The District courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

* * *

> "1359. A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise has been improperly or collusively made or joined to invoke the jurisdiction of such court."

[Vol. IV, A53-A63]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 17—October Term, 1962

(Argued October 2, 1962 Decided November 5, 1962)

Docket No. 27401

PARAGON OIL CO., INC.,
Libellant-Appellee,

v.

REPUBLIC TANKERS, S. A.,
Respondent-Appellee,

YACIMIENTOS PETROLIFEROS FISCALES, erroneously sued as YACIMIENTOS PETROLIFEROS FISCALES, S. A.,
Respondent-Appellant.

REPUBLIC TANKERS, S. A.,
Petitioner-Appellee,

v.

YACIMIENTOS PETROLIFEROS FISCALES,
Respondent-Impleaded-Appellant.

Before:

LUMBARD, Chief Judge,
FRIENDLY and KAUFMAN, Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York in admiralty, Richard H.

Levet, Jr., holding appellant liable for damage to a tanker by reason of breach of a safe berth clause.

Affirmed.

CHARLES A. ELLIS (Ralph Bosch), New York, New York, *for Appellant.*

ELI ELLIS (Hill, Betts, Yamaoka, Freehill & Longcope), New York, New York, *for Appellee Paragon Oil Co., Inc.*

DAVID GILCHRIST, New York, New York, *for Appellee Republic Tankers, S. A.*

FRIENDLY, *Circuit Judge:*

Paragon Oil Co., Inc., a New York corporation, alleging itself to be owner and operator of the tanker Greenpoint, filed a libel in the District Court for the Southern District of New York against Republic Tankers, S. A., a Panamanian corporation, and Yacimientos Petroliferos Fiscales (hereafter YPF), an agency of the Argentine Government, for damages sustained by the Greenpoint on April 17, 1957, when she grounded near a dock in Buenos Aires harbor. At the time the tanker was under a voyage charter to Republic, which in turn had entered into a contract of affreightment with YPF. Republic, acting by a proctor who was an associate in the firm representing Paragon, impleaded YPF. After a trial Judge Levet sustained Paragon's claim against Republic and Republic's against YPF; Paragon's direct claim against YPF was dismissed. YPF alone appeals; we affirm.

The evidence warranted the judge in finding the facts to be as follows:

On March 16, 1957, Paragon by Circle Shipping Co., Inc. as Agent, chartered the Greenpoint to Republic for a

voyage from Puerto La Cruz, Venezuela, to Buenos Aires. The charter party contained a safe berth clause. Previous to this, in December, 1956, YPF had entered into an agreement with Paragon Oil Company, Inc. (Del.) for the purchase of seven cargoes of fuel oil (Purchase Order NY-1970) and a complementary Affreightment Contract with Republic for the transportation of these cargoes to Buenos Aires or LaPlata in the Argentine (Purchase Order NY-1971). The Affreightment Contract, like so many commercial agreements, "carries its endorsements like bunting flapping in all directions," Devlin, Samples of Lawmaking (1962), 35. One of these appendages was a photostatic copy of some clauses from the same form of charter party, Warshipoilvoy (Rev.), used by Paragon and Republic in their Voyage Charter, among them the following:

> "6. SAFE BERTH, SHIFTING. The Vessel shall '~~load and~~' discharge, at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided that the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer * * *"

Thus, so far as here relevant, the Voyage Charter and the Affreightment Contract had identical safe berth clauses. Although a typewritten addition to the photostat explained that "The word charterers do [sic] not mean that Yacimientos Petroliferos Fiscales had chartered any ships, in view of the fact that Purchase Orders NY-1970 and NY-1971 are only one order with condition C & F, as shown in the corresponding Purchase Orders", it is plain that YPF assumed any obligations which the printed form specifically imposed on a "Charterer". The only other clause in the Affreightment Contract that needs to be mentioned at this juncture is one reading:

> "For your information the tankers which exceed 31 feet draft in fresh water, fully loaded, might

> require lighterage in Recalada, which expense, if any of course will be for seller's account because of the conditions C & F of combined Purchase Order NY-1970 and NY-1971. Other lighterage, if any, at discharge port to be for account of Y. P. F."

The Greenpoint had an agent, Milanowski, at Buenos Aires; he was appointed, as he said, "By the owners, the Republic Tankers, S. A., and by CIRCLE SHIPPING". The Greenpoint kept Milanowski advised of its progress down the South American coast; he passed this information on to YPF, ultimately informing it that the tanker would arrive on April 16, 1957, at Recalada and with high tide would proceed to Interseccion.[1] On April 15, YPF told Millanowski that the Greenpoint was to take berth B, C or D in the South Dock at Buenos Aires; on April 16, it confirmed Berth C. Having been instructed by YPF "To take a chance of the exceptionally high tides prevailing during the last days and enter ship without lightering, if, possible," Milanowski radioed the Greenpoint on April 16:

> "Advise when Recalada pilot on board and indicate ETA Interseccion where would lighter if necessary stop however if recent high tides prevail try enter south dock Baires without lightering * * *"

Consistently with this, although on April 16 YPF had assigned a vessel to lighter the Greenpoint at Interseccion, it later cancelled the order. The Rio de la Plata pilot, Granelli, who boarded the Greenpoint at Recalada on April 16, found her draft to be 30.8" both fore and aft; his deposition does not make clear whether this was a salt or fresh water reckoning. Upon the vessel's arriving at Interseccion early in the morning of April 17, Granelli was relieved by port pilots; they advised that, because of the continued high tides, there was sufficient water for the tanker to pro-

[1] Recalada is located in the Rio de la Plata almost due south of Montevideo and about 137 miles southeast of Buenos Aires. Interseccion is about 100 miles northwest of Recalada, at the entrance of the channel to Buenos Aires harbor.

ceed directly to the berth without lightering. Their advice proved correct; the Greenpoint arrived off South Dock C at 11:30 A.M. on April 17 without incident—only to find the berth occupied by the barge Esso Rosario.

On April 16 Milanowski had learned from YPF of the barge's being at Dock C; however, YPF advised that it would finish discharging at 5 P.M., and later that day confirmed that it had. Camerata, one of the port pilots who boarded the Greenpoint at Interseccion at 6:30 A.M. on April 17, advised her captain that Dock C was occupied by the barge but said he expected the barge would leave before the Greenpoint arrived. Milanowski had procured a tug to go out to Interseccion for lightering and attendant customs formalities if the tide required this. When he received a message from Camerata that the Greenpoint was coming directly to her berth, he went there. Finding the Esso Rosario at the dock, he phoned the YPF office, and was told that "they were waiting for Esso to take the barge immediately out." By this time the Greenpoint was approaching the berth and could no longer be ordered to turn around and anchor in deep water. She anchored alongside the barge, some 35 meters from the dock. Her fresh water arrival draft was 30'8" forward, 31'00" aft, mean 30'10". The YPF workers on the dock did not have a hose long enough to discharge her. Around 1:30 P.M. the Esso Rosario departed under its own power. Attempts were made to move the Greenpoint to the dock, but she was aground. At the afternoon high tide, around 6:00 or 7:00 P.M. on April 17, there were further efforts to move her, again without success. Later that night she was brought within 25 meters of the dock; discharge began on the morning of the 18th. By that evening she had been lightened enough to be brought against the dock. Next day, April 19, the chief mate reported she was leaking; surveyors were called and found her bottom plating damaged.

Paragon's case against Republic and Republic's against YPF rested on a simple series of propositions: A place to which the Greenpoint could proceed and from which she

could depart "always safely afloat" was warranted; it was not provided; therefore the warranty was breached and the warrantor was liable for the resulting damage. Although such simplicity is often delusive, courts should not spurn it when, as here, it is sufficient and appropriate.

YPF makes much of the fact that the Greenpoint's agent and captain both knew before her arrival at Buenos Aires that the Esso Rosario was at Berth C, and relies on the statement in *Panama R.R.* v. *Napier Shipping Co.*, 166 U. S. 280, 288 (1897), that the obligation to supply a safe berth "is manifestly inapplicable where the agent of the vessel is already acquainted with the danger, and assumes the responsibility of providing her with a safe berth." This reliance is misplaced, for three reasons. The first is that the Panama Railroad was only a wharfinger, who, in the absence of an express contract creating a higher standard, "does not guarantee the safety of vessels coming to his wharves," although he is "bound to exercise reasonable diligence in ascertaining the condition of the berths thereat, and if there is any dangerous obstruction to remove it, or to give due notice of its existence to vessels about to use the berths." *Smith* v. *Burnett*, 173 U. S. 430, 433 (1899). In contrast, Republic's liability to Paragon and YPF's to Republic was that assumed by a charterer, bound by the express terms of his contract "to furnish, not only a place which he believes to be safe, but a place where the chartered vessel can discharge 'always afloat'." *Constantine & Pickering S.S. Co.* v. *West India S.S. Co.*, 199 F. 964, 967 (S. D. N. Y. 1912) (Hough, D. J.) The second is that, on the judge's reasonable finding, YPF did not even meet the standard laid down for a wharfinger in *Smith* v. *Burnett*. The third is that, as the judge was warranted in finding, the Greenpoint's agent did not here "assume the responsibility of providing her with a safe berth."

We are not required to go so far as to hold that if Milanowski had known that on no account would Berth C be available on the Greenpoint's arrival and then had failed to give warning when warning would have availed, or if the cap-

tain had allowed the pilots to navigate the Greenpoint to a berth he knew would be filled, YPF would still be liable for the entire damage. See *Park S.S. Co.* v. *Cities Service Oil Co.*, 188 F. 2d 804, 806 (2 Cir.), cert. denied, 342 U. S. 862 (1951). No such showing was made. When Milanowski learned, on April 16, that the barge was at Berth C, he inquired of YPF and was assured first that it would finish discharging that afternoon and later that it had. He was entitled to rely on these assurances and their clear implication that the berth would be available the next day. When, on the 17th, he learned of the Esso Rosario's continued presence, it was too late to head off the Greenpoint. Similarly, although the captain of the Greenpoint knew about the Esso Rosario in the early morning of April 17, he also had a right to rely on the "express assurance" of the Affreightment Contract, *Cities Service Transp. Co.* v. *Gulf Ref. Co.*, 79 F. 2d 521 (2 Cir. 1935), particularly in the light of Camerata's advice that the barge was expected to leave the berth designated by YPF before the Greenpoint arrived.[2]

YPF claims also that the damage could have been avoided or lessened if no attempts had been made to maneuver the Greenpoint from the place where she grounded until the tide floated her. Cf. *The Tynebridge*, 6 F. Supp. 941 (E. D. Va. 1934). It is true that one liable for violating a safe berth clause "may lessen the amount of damages for which he is responsible by showing negligence, or even lack of diligence, on the part of the person wronged, in failing to take steps to lessen certain or even probable damages," *Constantine & Pickering S.S. Co.* v. *West India S.S. Co.*, *supra*, 199 F. at 967-968. However, this is an issue on which the defendant has the burden. McCormick, Damages (1935) § 33, at 130. Here the burden was not sustained. There was no proof how much of the damage to the plating was caused by the initial grounding and how much by the

[2] This would be so even though, as YPF contends, Camerata may have been acting on the basis of advice from Milanowski, since this advice was a reasonable interpretation of information Milanowski had received from YPF.

subsequent maneuvering. There was likewise no proof that the Greenpoint would have floated at high tide; she did not at the afternoon high tide of April 17 and it was only after being maneuvered closer to the dock later that night and then lightened that she was refloated. Finally the record is quite inconclusive as to who ordered the maneuvers. YPF's representatives were on the dock; they, the captain of the Greenpoint, the two port pilots, and Milanowski all seem to have been participating in the endeavor.

Two other contentions of YPF are readily answered. The first relates to the failure to lighter. Assuming as we do that the advice given Milanowski by YPF to "enter ship without lightering if possible" did not waive the contract provision as to 31' maximum draft, there is no evidence that the Greenpoint failed to meet it. And, whether the decision not to lighter was wise or not, there is nothing to show it would have had any untoward consequences if YPF had provided the safe berth it had warranted; so far as the record shows, the purpose of lighterage at Recalada or Interseccion was to enable the vessel to navigate shallow waters in the Rio de la Plata or in the Buenos Aires channel, not to meet conditions at the dock. The other argument relies on a clause in the fuel oil purchase order, which was incorporated into the Affreightment Contract, that "The Seller shall not be obliged to deliver or Buyer obliged to receive said product when and while and to the extent that Buyer is prevented from receiving or disposing of it or Seller from Manufacturing or making deliveries in its customary manner by acts of God, fire, strikes or other labor disturbances * * *", coupled with the fact that in April, 1957, tug employees in Buenos Aires, in an effort to raise their wages, were working only minimum hours. Whatever effect this might or might not have on YPF's obligation to receive the cargo, it has none on any issue before us.

YPF has devoted a considerable part of its briefs to a contention that Republic acted in "collusion" with Paragon, and has also moved that we vacate the decree below on that ground. The points particularly urged in the

briefs are that Republic's proctor was an associate in the firm which represented Paragon, and that Republic failed to make any defense. The motion is supported by verified allegations that the libellant Paragon of New York, Republic, and Greenpoint Tankers, Inc., a Delaware corporation which is registered owner of the Greenpoint, were all owned by the Schwartz brothers, and that Paragon of Delaware and Circle Shipping Co. were in turn owned by libellant—which facts were not known to YPF until after the trial. YPF says that if it had known or anticipated that Republic, a Panamanian corporation, would not defend against Paragon, it might have pleaded sovereign immunity, since its policy of not making this defense in American courts applied only when the plaintiff was American, as was the case with Paragon's direct claim but not with Republic's third-party claim. The myriad of Schwartz-owned corporations is, indeed, bewildering, and it would have been better if Republic had tendered the defense of Paragon's libel to YPF rather than going through what was only a form. As against this, the Court was not deceived as to the course Republic was taking, Republic's abstentionist position having been plain from the beginning, and it is hard to see that YPF suffered any prejudice thereby. YPF knew about the nature of the representation of Republic from the outset of the litigation —indeed, one must have some credulity to believe that YPF had not realized long before that Paragon Oil Co. of New York and Paragon Oil Co. of Delaware might be affiliated, or had not suspected a link between Paragon of Delaware and Republic when it negotiated complementary purchase orders with them, addressing both "% Sieling & Jarvis Corp." in the same building. Even if YPF is entitled to have the separate entities of the congeries of Schwartz-owned corporations disregarded, it would be liable none the less, since the ultimate responsibility to provide a safe berth rested on it; and the true party in interest would still be American. Indeed, we see no reason why libellant's direct claim against YPF should not have been sustained, on a theory akin to the liability to the shipowner of a

stevedoring company that contracts with a charterer, *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 428 (1959), or even with a consignee, *Waterman S. S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U. S. 421, 423-425 (1960). Neither are we told of any substantial defenses that an independent proctor could have interposed for Republic with any hope of success. The main suggestion is that something could have been made of the fact that Milanowski worked also for Circle Shipping, another Schwartz-owned corporation which was agent for libellant as well as for Republic, so that any fault on his part would defeat the recovery by the former against the latter. A sufficient answer is that we discern no fault to impute.

Finally, YPF claims that Paragon did not prove the allegation in the libel that it owned the Greenpoint. We need not debate whether YPF's denial of knowledge or information sufficient to form a belief as to this allegation was enough, without more, to require Paragon to submit proof of title. See *Boston Ins. Co.* v. *City of New York*, 130 F. 2d 156 (2 Cir. 1942). Paragon introduced the Voyage Charter with Republic in which Paragon was characterized as "Chartered Owner." This sufficed to bring into play the "almost universal rule that for a conversion of, or damage to, bailed goods by a third person, the bailee is entitled to recover the full value of the goods or the full extent of the damage inflicted." Brown, Personal Property (2d ed. 1955), 390; The Winkfield, L. R. [1902] page 42. Cf. *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303 (1927). If, as YPF now alleges in its motion, Greenpoint Tankers, Inc., also owned by the Schwartz brothers, was the "registered owner" of the Greenpoint, the district court has sufficient resources to protect YPF against any attempt at double recovery—an attempt we are confident will not be made.

The judgment is affirmed and the motion to vacate dismissed.

[Vol. IV, A-64]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the Fifth day of November, one thousand nine hundred and sixty-two.

PRESENT:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
Circuit Judges.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

A. DANIEL FUSARO
Clerk

[Vol. IV, A-81]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and sixty-two.

PRESENT:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
Circuit Judges.

[SAME TITLE]

A petition for a rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

[Vol. IV, A-83]

[Same Title]

Petition For Rehearing in Banc

Ralph Bosch, New York, N. Y., for appellant.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. Edward Lumbard,
Chief Judge.

28 Nov. 1962

[Vol. IV, A-85]

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and sixty-two.

PRESENT:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. THURGOOD MARSHALL,
Circuit Judges.

[SAME TITLE]

A petition for a rehearing in banc having been filed herein by counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

[Vol. IV, A-101]

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of December, one thousand nine hundred and sixty-two.

PRESENT:

HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
Circuit Judges.

[SAME TITLE]

A motion having been made herein by counsel for the appellant for leave to file a second petition for rehearing and to recall the mandate and for other and further relief,

Upon consideration thereof, it is

Ordered that the said motion be and it hereby is denied.

A. DANIEL FUSARO
Clerk

[Vol. IV, A-8]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

Petition to Vacate Decrees and Orders Now on Appeal in This Court and to Dismiss the Libel and the Impleader Petition.

The Petitioner, Yacimientos Petroliferos Fiscales, respectfully petitions the United States Court of Appeals for the Second Circuit for an order or decree vacating and setting aside the decree of the United States District Court of December 26, 1961, in favor of the libellant against respondent Republic Tankers, S. A., the decree of December 26, 1961 in favor of respondent-petitioner Republic Tankers, S. A. against your petitioner, and the order of December 24, 1958 which granted the motion of Republic Tankers, S. A. to implead your petitioner.

* * *

[A-9]

JURISDICTION.

This Court has inherent jurisdiction and power to vacate a District Court decree or order on appeal therefrom [A-10] pending in this Court whenever it is shown to the Court or the Court detects that collusion has been or is being practised in either obtaining or seeking to obtain or sustain for any purpose in any Court any judgment or decree of a Federal Court (*Gardner* v. *Goodyear Dental Vulcanite Co.*, 131 U. S., App. CIII but published in 21 L. Ed. 141; *U. S.* v. *Johnson*, 319 U. S. 302, 305; *Lord* v. *Veazie*, 8 How. (49 U. S.) 251, 255; *Wood Paper Co.* v. *Heft*, 8 Wall. (75 U. S.) 333; *Cleveland* v. *Chamberlain*,

1 Black (66 U. S.) 419, 426; *Judson* v. *Flushing Jockey Club*, 14 Misc. 350 and 562, 36 N. Y. Supp. 126 and 128; *Wood* v. *Nesbitt*, 19 N. Y. Supp. 423. See also *Czaplicki* v. *S. S. Hoegh Silvercloud*, 351 U. S. 521; *D'Amante* v. *Isthmian Lines, Inc.*, 159 F. Supp. 468, 1958 A. M. C. 1583). The Court has inherent jurisdiction to vacate any judgment or order obtained unfairly *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575, 580; *Hazel-Atlas Co.* v. *Hartford-Empire Co.*, 322 U. S. 238; *Shawkee Mfg. Co.* v. *Hartford-Empire Co.*, 322 U. S. 271).

It is the Court's duty to do so when anything affecting the public welfare may be involved (*United States* v. *Johnson*, supra, 319 U. S. 302). Since your petitioner is an important agency of the Government of Argentina, it is important, in the present critical period of the history of this Country and of Argentina that the Courts of either Country be not misused to occasion by collusion of private parties an unjust decree against an agency of the other Government.

STATEMENT OF THE CASE AND GROUNDS FOR RELIEF.

At the times involved herein the libellant herein was a New York corporation, the respondent and impleader [A-17] petitioner, Republic Tankers, S. A. was a Panamanian corporation. Both were owned by several brothers Schwartz, who reside and have offices in New York.

Another corporation of the same name as libellant, but organized in Delaware, was owned by the New York corporation and consequently, in effect, by the Schwartz brothers.

Circle Shipping Co., Inc., was a New York corporation owned by libellant New York corporation and consequently, in effect, by the Schwartz brothers.

Greenpoint Tankers, Inc. was a Delaware corporation owned by the Schwartz brothers and was registered owner of the S. S. Greenpoint.

The foregoing facts as to ownership of these several corporations by the Schwartz brothers and as to registered ownership of the S. S. Greenpoint were not known to peti-

tioner until after the trial of the case in District Court and the entry of the decree appealed from.

In December, 1956, your petitioner, without knowledge of ownership of both corporations by the Schwartz brothers, made with the Delaware corporation, Paragon Oil Company, Inc. a contract, Purchase Order No. NY 1970, for purchase of seven cargoes of oil, and with Republic Tankers, a contract, Purchase Order NY 1971, for affreightment, transportation and delivery of said seven cargoes to your petitioner at Buenos Aires. These contracts provided that they constituted together one "indivisible intransferable" contract, and the contract NY 1971 expressly provided that it does not mean that your petitioner chartered any ships.

The first and third cargoes were carried by the S. S. Greenpoint, of which Capt. Urbani was master.

[A-12] The agent of Republic Tankers, S. A. and Circle Shipping Co., Inc. in Buenos Aires was Vitalis A. Milanowski.

By the libel herein, libellant, claiming to be "the owner and operator of the S. S. "Greenpoint", sued your petitioner and Republic Tankers, S. A. for damages allegedly sustained by grounding of the vessel at Buenos Aires on the third voyage. The libel, verified by B. D. Schwartz, did not disclose that libellant and Republic Tankers, S. A. were both owned by the Schwartz brothers, or that the suit as between libellant and Republic Tankers, S. A. was in effect a suit by the Schwartz brothers against themselves.

The libel alleged that libellant chartered the vessel to Republic Tankers, S. A. on March 16, 1957, but did not disclose that any such charter contract was in effect a contract of the Schwartz brothers with themselves.

Libellant appeared by Hill, Betts & Nash as proctors.

Process was issued against your petitioner but not against Republic Tankers, S. A. But after your petitioner appeared and answered, Republic Tankers, S. A. then appeared by David I. Gilchrist as proctor, and filed an answer and petitions to implead your petitioner all verified by Mr. Gilchrist and not by any of the Schwartz brothers.

Your petitioner's proctor learned that Mr. Gilchrist was associated with and an employee of Hill, Betts & Nash, the proctors for libellant, and pleaded collusion for this reason. But neither your petitioner nor petitioner's counsel knew nor did either of Appellees disclose to them or to the court that the two corporations were both owned by the Schwartz brothers.

[A-13] The answer and the three interpleader petitions verified and filed by Mr. Gilchrist nominally for Republic Tankers, S. A. (but actually for the Schwartz brothers who were its owners and the owners of libellant) prayed that the libel be "dismissed" as against it, but prayed also for a decree against your petitioner for any amount that might be "awarded" to libellant "against" Republic Tankers, S. A. It thus affected an adversary status as respects libellant equally as respects your petitioner.

Your petitioner submits that if Republic Tankers, S. A. and Mr. Gilchrist who verified its answer and impleader petitions had been sincere in pleading that the libel "be dismissed" as against it, they could readily have procured such dismissal by setting forth in such pleading (and that honesty required their setting forth) the true facts.

* * * *

[A-16] Your petitioner submits that it is now apparent that it was never the intention or purpose of Republic Tankers, S. A. or Mr. Gilchrist to cause the libel to be dismissed, but it was their intention and purpose and the intention and purpose of libellant (specifically the intention and purpose of the Schwartz brothers who owned both corporations) and was the intention and purpose of Hill, Betts & Nash (now Hill, Betts, Yamaoka, Freehill & Longcope) and of Mr. Gilchrist, both acting on behalf of the Schwartz brothers owning both corporations, to cause a collusive decree to be rendered in favor nominally of libellant (owned by the Schwartz brothers) and nominally against Republic Tankers, S. A. (owned by the Schwartz brothers), in a concerted and collusive effort and as a collusive means on behalf of the Schwartz brothers to make

it falsely appear and be adjudged that a justiciable controversy between them was duly pleaded and duly tried and that Republic Tankers, S. A. as a bona fide adversary was compelled by libellant as an adversary and in an adversary proceeding to incur a judgment liability to libellant, upon the sanctity of which the same Court and this Court might rely in determining whether Republic Tankers, S. A. had any liability to libellant as a basis [A-17] for Republic Tankers, S. A. itself claiming against your petitioner for alleged damages occasioned to it thereby.

* * *

[A-24] Certainly Mr. B. D. Schwartz, who verified the libel, knew that all the several corporations involved were owned by himself and his brothers, and that Mr. Gilchrist was acting in their interests in representing Republic Tankers, S. A. (owned by the Schwartz brothers) as were Hill, Betts & Nash in representing libellant (owned by the Schwartz brothers). Candor and fairness to the Court and to your petitioner required disclosure of these facts by the Schwartz brothers to their proctors, to the Court and to petitioner: and it was collusive and deceitful of Libellant and Republic Tankers, S. A. and of the Schwartz brothers, as owners of both, not to make such disclosure.

Certainly, Hill, Betts & Nash and Mr. Gilchrist either did or did not know that the corporations involved were all owned by the Schwartz brothers. If they knew this, then candor and fairness to the Court and your petitioner required them, as proctors, either to disclose these facts to the Court and to petitioner, or to refuse to participate in the collusive and deceitful conduct of the Schwartz brothers and their corporations.

If, however, they did not know that the purported adversary litigants, libellant and Republic Tankers, S. A. were both owned by the Schwartz brothers, then they were imposed on and deceived as were the Court and your petitioner; and candor [A-25] and fairness to the Court and your petitioner requires them, as proctors, to now disclose to the court such as the true facts.

WHEREFORE, Petitioner prays for an order vacating and setting aside the decree of December 26, 1961 in favor of libellant against Republic Tankers, S. A. except that part that dismisses the libel as to your petitioner, upon the ground that libellant and Republic Tankers, S. A. were two corporations owned by the Schwartz brothers, and the suit between them was not in any real sense adversary and was not a genuine litigation of a real controversy between actual litigants over rights contested between them as opposing parties, but was a simulated issue as to which the same persons owning both corporations dominated both sides of the record, and said decree in favor of the one corporation against the other is void for collusion; and for an order vacating and setting aside or reversing the companion decree of December 26, 1961, in favor of Republic Tankers, S. A. against your petitioner upon the ground that it is occasioned by such collusion and cannot be sustained without sustaining the other; and for such other and further relief as to the Court may seem just and proper, together with costs and disbursements to your petitioner in this Court and in the District Court.

Respectfully submitted,

RALPH BOSCH,
Proctor for Petitioner,
Office & P. O. Address,
10 East 40th Street,
New York 16, N. Y.

CHARLES ANDREWS ELLIS,
of Counsel.

[A-27]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RALPH BOSCH, being duly sworn, deposes and says: that he is proctor for Yacimientos Petroliferos Fiscales (Argentine Government Oil Fields), the respondent-appellant and respondent-impleaded-appellant herein, hereinafter referred to as YPF, and makes this affidavit in support of a motion to vacate the decree in favor of libellant-appellee, Paragon Oil Co., Inc. against Republic Tankers, S. A., entered December 26, 1961, and to dismiss the libel as to the said Republic Tankers, S. A., upon the ground that the libellant and Republic Tankers, S. A., were not bona-fide adversaries and that the proceeding was instituted and the decree in favor of libellant-appellee [A-28] against Republic Tankers, S. A. was obtained by their falsely pretending the existence of a controversy between them and by collusion between the said Republic Tankers, S. A. and libellant-appellee and solely for use against YPF; and to vacate the decree in favor of Republic Tankers, S. A. against YPF upon the ground that apart from other errors in its procurement the said decree in favor of said Republic Tankers, S. A. against YPF is invalid by reason of the invalidity of libellant's decree against Republic Tankers, S. A. and must be vacated upon vacating the said libellant's decree against Republic Tankers, S. A.

* * *

[A-31] In Buenos Aires deponent asked Mr. Eli Ellis whether he had any written authorization to represent Republic Tankers, S. A., whom he was not representing in the suit, and he stated that Mr. Joseph Nestor was Vice President of Republic Tankers, S. A. and had accompanied him to Buenos Aires to represent Republic Tankers, S. A. in any settlement discussions. At no time did either of them disclose to deponent that libellant and Republic Tankers, S. A. were owned by the Schwartz brothers.

In their separate briefs August 31, 1962, upon the appeal herein (Docket No. 27401) Mr. Eli Ellis and Mr. Gilchrist

have claimed that they informed me and my associate and the Court that the two were "affiliated companies". Their briefs, however, do not even now disclose the nature of the affiliation.

Subsequent to the trial, and influenced by the fact that, notwithstanding our charge that collusion was involved, said officer of Republic Tankers, S. A. who was in Court was not put on the stand as a witness by either Mr. Eli Ellis or Mr. Girchrist. I employed an Attorney in Panama to check and [A-32] report on all data on file there respecting Republic Tankers, S. A.; and I was astonished to be finally informed, and provided with evidence to show, that Republic Tankers, S. A. was organized at the Panamanian Consulate in New York by two brothers, Schwartz, and that at the times involved in this action libellant and Republic Tankers, S. A. were both owned by the Schwartz brothers, and for this reason could have no genuine adversary status as litigants, even were they represented by independent proctors.

* * *

[A-33] Deponent therefore investigated as to the several "Paragon" companies and as to the ownership of the S. S. Greenpoint and deponent has since then discovered that there were SEVEN corporations, all owned directly or beneficially by the Schwartz Brothers, namely: three "Paragon Oil Co., Inc.", organized and incorporated in the States of Delaware, New York and New Jersey, respectively, two "Republic Tankers", i.e., one Republic Tankers, S. A., organized as a Panamanian corporation before the Panamanian Consulate and the other Republic Tankers Corporation organized and incorporated under the laws of the State of New York; Greenpoint Tankers, Inc., incorporated under the laws of Delaware and Circle Shipping Co., Inc., organized and incorporated under the laws of the State of New York.

[A-34] Deponent further discovered the following:

Ownership of the S. S. Greenpoint was in the name of Greenpoint Tankers, Inc.

Three of the Schwartz brothers were directors of all of the aforesaid SEVEN corporations and Mr. B. D. Schwartz, who verified the libel of the libellant corporation was a director and an officer of each of said SEVEN corporations, including Republic Tankers, S. A. whose answer and petition was verified by Mr. Gilchrist and that all of the said seven corporations had offices either at 2100 Hunters Point Avenue, Long Island City, New York, and/or at 30 East 40th Street, New York, New York, where the said Schwartz brothers then had and still continue to have offices.

The foregoing facts deponent can substantiate by duly certified instruments which deponent begs leave to present at the argument of this motion in the event libellant and or Republic Tankers, S. A. make any denial of these facts.

* * *

[A-36] 11. That at the said times the said B. D. Schwartz, his brothers, and the said Hill, Betts & Nash knew that a decree or suit for a decree merely in favor of libellant against Republic Tankers, S. A. would avail them nothing, since such would be in effect a suit for a decree by and against the brothers Schwartz, owning both libellant and Republic Tankers, S. A.

12. At the time of the said verification and filing the said B. D. Schwartz and his brothers and their said attorneys knew that the prosecution in the name of the corporate libellant of a claim against the said Republic Tankers, S. A. would not involve an honest and actual assertion of adversary rights nor constitute a real controversy between actual litigants but in effect would represent the Schwartz brothers suing [A-37] themselves, and that this would be apparent if Republic Tankers, S. A. were also openly represented by the said firm of Hill, Betts & Nash and that the court might refuse to entertain a suit between libellant and Republic Tankers, S. A. with the said firm of Hill, Betts & Nash openly representing both as proctors of record.

13. At the time of the said verification and filing the said B. D. Schwartz, his brothers and their said attorneys

Hill, Betts & Nash knew that if any answer, petition or other pleading in the name of Republic Tankers, S. A. were verified by the said B. D. Schwartz of any of his said brothers, it would become apparent that the proceeding as between said libellant and said Republic Tankers, S. A. was not an actual adversary suit.

• • •

[A-38] 16. That at the same time the said B. D. Schwartz, his said brothers and the said Hill, Betts & Nash were determined nevertheless to present and control in all respects a simulated issue as between libellant and Republic Tankers, S. A. and to dominate both sides of the record as respects such simulated issue in order to insure that Republic Tankers, S. A. should not be effectively defended and that libellant should obtain a decree against Republic Tankers, S. A. as a basis for a claim by it over against YPF for the benefit of libellant and the Schwartz brothers and to deceive the court and YPF in these respects.

• • •

[A-39] 21. That YPF and deponent did not know that the said Republic Tankers, S. A. and libellant were both owned by the Schwartz brothers, nor that the said B. D. Schwartz and Henry Schwartz were officers of both corporations and were residents of the City of New York with offices and place of business at No. 30 East 40th Street, Manhattan, New York City, and 2100 Hunters Point Avenue, Long Island City, New York.

22. That the said answer of Republic Tankers, S. A., verified as aforesaid, contained the following prayer:

> "Wherefore, respondent prays that the libel herein be dismissed as against it with costs."

Also three impleader petitions of Republic Tankers, S. A., similarly and for the same recited reasons verified by said Mr. Gilchrist on September 16, 1958, December 11, 1958 and December 29, 1958, each contained a prayer that the

libel be dismissed against said petitioner. But in truth and in fact the said Republic Tankers, S. A. did not seek to have the libel dismissed against it, but made its appearance and filed its answer and its impleader petitions with the intent and purpose of obtaining a decree of liability upon its part to libellant, to support a claim over by it against YPF for the benefit of libellant and the brothers Schwartz.

[A-41] Deponent has for a few years had pleasant relations with, and admiration for the firm, and regrets that in their briefs they have sought to convert the matter into one between proctors. It is, however, rather a matter seriously affecting the rights of my client, an important agency of the Argentine Government, and must be determined as such, in the light of the facts.

Deponent therefore prays for the relief prayed for in the petition.

RALPH BOSCH
Ralph Bosch

Sworn to before me
this 24th day of September, 1962.

HERBERT E. NELSON

Herbert E. Nelson
Notary Public, State of New York
No. 24-8116150
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1964

Revised American Foreign Trade Definitions— 1941

Adopted July 30, 1941 by a
Joint Committee representing the

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA

NATIONAL COUNCIL OF AMERICAN
IMPORTERS, INC.

NATIONAL FOREIGN TRADE COUNCIL,
INC.

Issued by the

National Foreign Trade Council, Inc.
10 Rockefeller Plaza
New York 20, New York

PRINTED IN U.S.A.

Revised American Foreign Trade Definitions— 1941

Adopted July 30, 1941, by a Joint Committee representing the Chamber of Commerce of the United States of America, the National Council of American Importers, Inc., and the National Foreign Trade Council, Inc.

FOREWORD

Since the issuance of *American Foreign Trade Definitions* in 1919, many changes in practice have occurred. The 1919 Definitions did much to clarify and simplify foreign trade practice, and received wide recognition and use by buyers and sellers throughout the world. At the Twenty-Seventh National Foreign Trade Convention, 1940, further revision and clarification of these Definitions was urged as necessary to assist the foreign trader in the handling of his transactions.

The following ***Revised American Foreign Trade Definitions - 1941*** are recommended for general use by both exporters and importers. These revised definitions have no status at law unless there is specific legislation providing for them, or unless they are confirmed by court decisions. Hence, it is suggested that sellers and buyers agree to their acceptance as part of the contract of sale. These revised definitions will then become legally binding upon all parties.

In view of changes in practice and procedure since 1919, certain new responsibilities for sellers and buyers are included in these revised definitions. Also, in many instances, the old responsibilities are more clearly defined than in the 1919 Definitions, and the changes should be beneficial both to sellers and buyers. Widespread acceptance will lead to a greater standardization of foreign trade procedure, and to the avoidance of much misunderstanding.

Adoption by exporters and importers of these revised terms will impress on all parties concerned their respective responsibilities and rights.

General Notes of Caution

1. As foreign trade definitions have been issued by organizations in various parts of the world, and as the courts of countries have interpreted these definitions in different ways, it is important that sellers and buyers agree that their contracts are subject to the ***Revised American Foreign Trade Definitions - 1941*** and that the various points listed are accepted by both parties.

2. In addition to the foreign trade terms listed herein, there are terms that are at times used, such as Free Harbor, C.I.F. & C. (Cost, Insurance, Freight, and Commission), C.I.F.C. & I. (Cost, Insurance, Freight, Commission, and Interest), C.I.F. Landed (Cost, Insurance, Freight, Landed), and others. None of these should be used unless there has first been a definite understanding as to the exact meaning thereof. It is unwise to attempt to interpret other terms in the light of the terms given herein. Hence, whenever possible, one of the terms defined herein should be used.

3. It is unwise to use abbreviations in quotations or in contracts which might be subject to misunderstanding.

4. When making quotations, the familiar terms "hundredweight" or "ton" should be avoided. A hundredweight can be 100 pounds of the short ton, or 112 pounds of the long ton. A ton can be a short ton of 2,000 pounds, or a metric ton of 2,204.6 pounds, or a long ton of 2,240 pounds. Hence, the type of hundredweight or ton should be clearly stated in quotations and in sales confirmations. Also, all terms referring to quantity, weight, volume, length, or surface should be clearly defined and agreed upon.

5. If inspection, or certificate of inspection, is required, it should be agreed, in advance, whether the cost thereof is for account of seller or buyer.

6. Unless otherwise agreed upon, all expenses are for the account of seller up to the point at which the buyer must handle the subsequent movement of goods.

7. There are a number of elements in a contract that do not fall within the scope of these foreign trade definitions. Hence, no mention of these is made herein. Seller and buyer should agree to these separately when negotiating contracts. This particularly applies to so called "customary" practices.

DEFINITIONS OF QUOTATIONS

(I) EX (Point of Origin)

"EX FACTORY", "EX MILL", "EX MINE", "EX PLANTATION", "EX WAREHOUSE", etc. (named point of origin)

Under this term, the price quoted applies only at the point of origin, and the seller agrees to place the goods at the disposal of the buyer at the agreed place on the date or within the period fixed.

Under this quotation:

Seller must

(1) bear all costs and risks of the goods until such time as the buyer is obliged to take delivery thereof;

(2) render the buyer, at the buyer's request and expense, assistance in obtaining the documents issued in the country of origin, or of shipment, or of both, which the buyer may require either for purposes of exportation, or of importation at destination.

Buyer must

(1) take delivery of the goods as soon as they have been placed at his disposal at the agreed place on the date or within the period fixed;

(2) pay export taxes, or other fees or charges, if any, levied because of exportation;

(3) bear all costs and risks of the goods from the time when he is obligated to take delivery thereof;

(4) pay all costs and charges incurred in obtaining the documents issued in the country of origin, or of shipment, or of both, which may be required either for purposes of exportation, or of importation at destination.

(II) F.O.B. (Free on Board)

NOTE: *Seller and buyer should consider not only the definitions but also the "Comments on All F.O.B. Terms" given at end of this section (page 9), in order to understand fully their respective responsibilities and rights under the several classes of "F.O.B." terms.*

(II-A) "F.O.B. (named inland carrier at named inland point of departure)"*

Under this term, the price quoted applies only at inland shipping point, and the seller arranges for loading of the goods on, or in, railway cars, trucks, lighters, barges, aircraft, or other conveyance furnished for transportation.

* See Note above and Comments on All F.O.B. Terms (page 9).

Under this quotation:

Seller must

(1) place goods on, or in, conveyance, or deliver to inland carrier for loading;

(2) provide clean bill of lading or other transportation receipt, freight collect;

(3) be responsible for any loss or damage, or both, until goods have been placed in, or on, conveyance at loading point, and clean bill of lading or other transportation receipt has been furnished by the carrier;

(4) render the buyer, at the buyer's request and expense, assistance in obtaining the documents issued in the country of origin, or of shipment, or of both, which the buyer may require either for purposes of exportation, or of importation at destination.

Buyer must

(1) be responsible for all movement of the goods from inland point of loading, and pay all transportation costs;

(2) pay export taxes, or other fees or charges, if any, levied because of exportation;

(3) be responsible for any loss or damage, or both, incurred after loading at named inland point of departure;

(4) pay all costs and charges incurred in obtaining the documents issued in the country of origin, or of shipment, or of both, which may be required either for purposes of exportation, or of importation at destination.

(II-B) "F.O.B. (named inland carrier at named inland point of departure) FREIGHT PREPAID TO (named point of exportation)"*

Under this term, the seller quotes a price including transportation charges to the named point of exportation and prepays freight to named point of exportation, without assuming responsibility for the goods after obtaining a clean bill of lading or other transportation receipt at named inland point of departure.

Under this quotation:

Seller must

(1) assume the seller's obligations as under II-A (page 5), except that under (2) he must provide clean bill of lading or other transportation receipt, freight prepaid to named point of exportation.

Buyer must

(1) assume the same buyer's obligations as under II-A (page 5), except that he does not pay freight from loading point to named point of exportation.

* See Note (page 4) and Comments on all F.O.B. Terms (page 9)

(II-C) "F.O.B. (named inland carrier at named inland point of departure) FREIGHT ALLOWED TO (named point)"*

Under this term, the seller quotes a price including the transportation charges to the named point, shipping freight collect and deducting the cost of transportation, without assuming responsibility for the goods after obtaining a clean bill of lading or other transportation receipt at named inland point of departure.

Under this quotation:

Seller must

(1) assume the same seller's obligations as under II-A (page 5), but deducts from his invoice the transportation cost to named point.

Buyer must

(1) assume the same buyer's obligations as under II-A (page 5), including payment of freight from inland loading point to named point, for which seller has made deduction.

(II-D) "F.O.B. (named inland carrier at named point of exportation)"*

Under this term, the seller quotes a price including the costs of transportation of the goods to named point of exportation, bearing any loss or damage, or both, incurred up to that point.

Under this quotation:

Seller must

(1) place goods on, or in, conveyance, or deliver to inland carrier for loading;

(2) provide clean bill of lading or other transportation receipt, paying all transportation costs from loading point to named point of exportation;

(3) be responsible for any loss or damage, or both, until goods have arrived in, or on, inland conveyance at the named point of exportation;

(4) render the buyer, at the buyer's request and expense, assistance in obtaining the documents issued in the country of origin, or of shipment, or of both, which the buyer may require either for purposes of exportation, or of importation at destination.

Buyer must

(1) be responsible for all movement of the goods from inland conveyance at named point of exportation;

* See Note (page 4) and Comments on all F.O.B. Terms (page 9).

(2) pay export taxes, or other fees or charges, if any, levied becauses of exportation;

(3) be responsible for any loss or damage, or both, incurred after goods have arrived in, or on, inland conveyance at the named point of exportation;

(4) pay all costs and charges incurred in obtaining the documents issued in the country of origin, or of shipment, or of both, which may be required either for purposes of exportation, or of importation at destination.

(II-E) "F.O.B. VESSEL (named port of shipment)"*

Under this term, the seller quotes a price covering all expenses up to, and including, delivery of the goods upon the overseas vessel provided by, or for, the buyer at the named port of shipment.

Under this quotation:

Seller must

(1) pay all charges incurred in placing goods actually on board the vessel designated and provided by, or for, the buyer on the date or within the period fixed;

(2) provide clean ship's receipt or on-board bill of lading;

(3) be responsible for any loss or damage, or both, until goods have been placed on board the vessel on the date or within the period fixed;

(4) render the buyer, at the buyer's request and expense, assistance in obtaining the documents issued in the country of origin, or of shipment, or of both, which the buyer may require either for purposes of exportation, or of importation at destination.

Buyer must

(1) give seller adequate notice of name, sailing date, loading berth of, and delivery time to, the vessel;

(2) bear the additional costs incurred and all risks of the goods from the time when the seller has placed them at his disposal if the vessel named by him fails to arrive or to load within the designated time;

(3) handle all subsequent movement of the goods to destination:

(a) provide and pay for insurance;

(b) provide and pay for ocean and other transportation;

(4) pay export taxes, or other fees or charges, if any, levied because of exportation;

* See Note (page 4) and Comments on all F.O.B. Terms (page 9).

(5) be responsible for any loss or damage, or both, after goods have been loaded on board the vessel;

(6) pay all costs and charges incurred in obtaining the documents, other than clean ship's receipt or bill of lading, issued in the country of origin, or of shipment, or of both, which may be required either for purposes of exportation, or of importation at destination.

(II-F) "F.O.B. (named inland point in country of importation)"*

Under this term, the seller quotes a price including the cost of the merchandise and all costs of transportation to the named inland point in the country of importation.

Under this quotation:

Seller must

(1) provide and pay for all transportation to the named inland point in the country of importation;

(2) pay export taxes, or other fees or charges, if any, levied because of exportation;

(3) provide and pay for marine insurance;

(4) provide and pay for war risk insurance, unless otherwise agreed upon between the seller and buyer;

(5) be responsible for any loss or damage, or both, until arrival of goods on conveyance at the named inland point in the country of importation;

(6) pay the costs of certificates of origin, consular invoices, or any other documents issued in the country of origin, or of shipment, or of both, which the buyer may require for the importation of goods into the country of destination and, where necessary, for their passage in transit through another country;

(7) pay all costs of landing, including wharfage, landing charges, and taxes, if any;

(8) pay all costs of customs entry in the country of importation;

(9) pay customs duties and all taxes applicable to imports, if any, in the country of importation.

NOTE: *The seller under this quotation must realize that he is accepting important responsibilities, costs, and risks, and should therefore be certain to obtain adequate insurance. On the other hand, the importer or buyer may desire such quotations to relieve him of the risks of the voyage and to assure him of his landed costs at inland point in country of importa-*

* See Note (page 4) and Comments on all F.O.B. Terms (page 9)

tion. When competition is keen, or the buyer is accustomed to such quotations from other sellers, seller may quote such terms, being careful to protect himself in an appropriate manner.

Buyer must

(1) take prompt delivery of goods from conveyance upon arrival at destination;

(2) bear any costs and be responsible for all loss or damage, or both, after arrival at destination.

Comments On All F.O.B. Terms

In connection with F.O.B. terms, the following points of caution are recommended:

1. The method of inland transportation, such as trucks, railroad cars, lighters, barges, or aircraft should be specified.

2. If any switching charges are involved during the inland transportation, it should be agreed, in advance, whether these charges are for account of the seller or the buyer.

3. The term "F.O.B. (named port)", without designating the exact point at which the liability of the seller terminates and the liability of the buyer begins, should be avoided. The use of this term gives rise to disputes as to the liability of the seller or the buyer in the event of loss or damage arising while the goods are in port, and before delivery to or on board the ocean carrier. Misunderstandings may be avoided by naming the specific point of delivery.

4. If lighterage or trucking is required in the transfer of goods from the inland conveyance to ship's side, and there is a cost therefor, it should be understood, in advance, whether this cost is for account of the seller or the buyer.

5. The seller should be certain to notify the buyer of the minimum quantity required to obtain a carload, a truckload, or a barge-load freight rate.

6. Under F.O.B. terms, excepting "F.O.B. (named inland point in country of importation)", the obligation to obtain ocean freight space, and marine and war risk insurance, rests with the buyer. Despite this obligation on the part of the buyer, in many trades the seller obtains the ocean freight space, and marine and war risk insurance, and provides for shipment on behalf of the buyer. Hence, seller and buyer must have an understanding as to whether the buyer will obtain the ocean freight space, and marine and war risk insurance, as is his obligation, or whether the seller agrees to do this for the buyer.

7. For the seller's protection, he should provide in his contract of sale that marine insurance obtained by the buyer include standard warehouse to warehouse coverage.

(III) F.A.S. (Free Along Side)

NOTE: *Seller and buyer should consider not only the definitions but also the "Comments" given at the end of this section (page 11), in order to understand fully their respective responsibilities and rights under "F.A.S." terms.*

"F.A.S. VESSEL (named port of shipment)"

Under this term, the seller quotes a price including delivery of the goods along side overseas vessel and within reach of its loading tackle.

Under this quotation:

Seller must

(1) place goods along side vessel or on dock designated and provided by, or for, buyer on the date or within the period fixed; pay any heavy lift charges, where necessary, up to this point;

(2) provide clean dock or ship's receipt;

(3) be responsible for any loss or damage, or both, until goods have been delivered along side the vessel or on the dock;

(4) render the buyer, at the buyer's request and expense, assistance in obtaining the documents issued in the country of origin, or of shipment, or of both, which the buyer may require either for purposes of exportation, or of importation at destination.

Buyer must

(1) give seller adequate notice of name, sailing date, loading berth of, and delivery time to, the vessel;

(2) handle all subsequent movement of the goods from along side the vessel:

(a) arrange and pay for demurrage or storage charges, or both, in warehouse or on wharf, where necessary;

(b) provide and pay for insurance;

(c) provide and pay for ocean and other transportation;

(3) pay export taxes, or other fees or charges, if any, levied because of exportation;

(4) be responsible for any loss or damage, or both, while the goods are on a lighter or other conveyance along side vessel within reach of its loading tackle, or on the dock awaiting loading, or until actually loaded on board the vessel, and subsequent thereto;

(5) pay all costs and charges incurred in obtaining the documents, other than clean dock or ship's receipt, issued in the country of origin, or of shipment, or of both, which may be required either for purposes of exportation, or of importation at destination.

F.A.S. Comments

1. Under F.A.S. terms, the obligation to obtain ocean freight space, and marine and war risk insurance, rests with the buyer. Despite this obligation on the part of the buyer, in many trades the seller obtains ocean freight space, and marine and war risk insurance, and provides for shipment on behalf of the buyer. In others, the buyer notifies the seller to make delivery along side a vessel designated by the buyer and the buyer provides his own marine and war risk insurance. Hence, seller and buyer must have an understanding as to whether the buyer will obtain the ocean freight space, and marine and war risk insurance, as is his obligation, or whether the seller agrees to do this for the buyer.

2. For the seller's protection, he should provide in his contract of sale that marine insurance obtained by the buyer include standard warehouse to warehouse coverage.

(IV) C. & F. (Cost and Freight)

NOTE: *Seller and buyer should consider not only the definitions but also the "C. & F. Comments" (page 12) and the "C. & F. and C.I.F. Comments" (pages 14-15), in order to understand fully their respective responsibilities and rights under "C. & F." terms.*

"C. & F. (named point of destination)"

Under this term, the seller quotes a price including the cost of transportation to the named point of destination.

Under this quotation:

Seller must

(1) provide and pay for transportation to named point of destination;

(2) pay export taxes, or other fees or charges, if any, levied because of exportation;

(3) obtain and dispatch promptly to buyer, or his agent, clean bill of lading to named point of destination;

(4) where received-for-shipment ocean bill of lading may be tendered, be responsible for any loss or damage, or both, until the goods have been delivered into the custody of the ocean carrier;

(5) where on-board ocean bill of lading is required, be responsible for any loss or damage, or both, until the goods have been delivered on board the vessel;

(6) provide, at the buyer's request and expense, certificates of origin, consular invoices, or any other documents issued in the country

of origin, or of shipment, or of both, which the buyer may require for importation of goods into country of destination and, where necessary, for their passage in transit through another country.

Buyer must

(1) accept the documents when presented;

(2) receive goods upon arrival, handle and pay for all subsequent movement of the goods, including taking delivery from vessel in accordance with bill of lading clauses and terms; pay all costs of landing, including any duties, taxes, and other expenses at named point of destination;

(3) provide and pay for insurance;

(4) be responsible for loss of or damage to goods, or both, from time and place at which seller's obligations under (4) or (5) above have ceased;

(5) pay the costs of certificates of origin, consular invoices, or any other documents issued in the country of origin, or of shipment, or of both, which may be required for the importation of goods into the country of destination and, where necessary, for their passage in transit through another country.

C. & F. Comments

1. For the seller's protection, he should provide in his contract of sale that marine insurance obtained by the buyer include standard warehouse to warehouse coverage.

2. The comments listed under the following C.I.F. terms in many cases apply to C. & F. terms as well, and should be read and understood by the C. & F. seller and buyer.

(V) C.I.F. (Cost, Insurance, Freight)

NOTE: *Seller and buyer should consider not only the definitions but also the "Comments" (pages 14-15), at the end of this section, in order to understand fully their respective responsibilities and rights under "C.I.F." terms.*

"C.I.F. (named point of destination)"

Under this term, the seller quotes a price including the cost of the goods, the marine insurance, and all transportation charges to the named point of destination.

Under this quotation:

Seller must

(1) provide and pay for transportation to named point of destination;

(2) pay export taxes, or other fees or charges, if any, levied because of exportation;

(3) provide and pay for marine insurance;

(4) provide war risk insurance as obtainable in seller's market at time of shipment at buyer's expense, unless seller has agreed that buyer provide for war risk coverage (See Comment 10 (c), page 15);

(5) obtain and dispatch promptly to buyer, or his agent, clean bill of lading to named point of destination, and also insurance policy or negotiable insurance certificate;

(6) where received-for-shipment ocean bill of lading may be tendered, be responsible for any loss or damage, or both, until the goods have been delivered into the custody of the ocean carrier;

(7) where on-board ocean bill of lading is required, be responsible for any loss or damage, or both, until the goods have been delivered on board the vessel;

(8) provide, at the buyer's request and expense, certificates of origin, consular invoices, or any other documents issued in the country of origin, or of shipment, or both, which the buyer may require for importation of goods into country of destination and, where necessary, for their passage in transit through another country.

Buyer must

(1) accept the documents when presented;

(2) receive the goods upon arrival, handle and pay for all subsequent movement of the goods, including taking delivery from vessel in accordance with bill of lading clauses and terms; pay all costs of landing, including any duties, taxes, and other expenses at named point of destination;

(3) pay for war risk insurance provided by seller;

(4) be responsible for loss of or damage to goods, or both, from time and place at which seller's obligations under (6) or (7) above have ceased;

(5) pay the cost of certificates of origin, consular invoices, or any other documents issued in the country of origin, or of shipment, or both, which may be required for importation of the goods into the country of destination and, where necessary, for their passage in transit through another country.

C. & F. and C.I.F. Comments

Under C. & F. and C.I.F. contracts there are the following points on which the seller and the buyer should be in complete agreement at the time that the contract is concluded:

1. It should be agreed upon, in advance, who is to pay for miscellaneous expenses, such as weighing or inspection charges.

2. The quantity to be shipped on any one vessel should be agreed upon, in advance, with a view to the buyer's capacity to take delivery upon arrival and discharge of the vessel, within the free time allowed at the port of importation.

3. Although the terms C. & F. and C.I.F. are generally interpreted to provide that charges for consular invoices and certificates of origin are for the account of the buyer, and are charged separately, in many trades these charges are included by the seller in his price. Hence, seller and buyer should agree, in advance, whether these charges are part of the selling price, or will be invoiced separately.

4. The point of final destination should be definitely known in the event the vessel discharges at a port other than the actual destination of the goods.

5. When ocean freight space is difficult to obtain, or forward freight contracts cannot be made at firm rates, it is advisable that sales contracts, as an exception to regular C. & F. or C.I.F. terms, should provide that shipment within the contract period be subject to ocean freight space being available to the seller, and should also provide that changes in the cost of ocean transportation between the time of sale and the time of shipment be for account of the buyer.

6. Normally, the seller is obligated to prepay the ocean freight. In some instances, shipments are made freight collect and the amount of the freight is deducted from the invoice rendered by the seller. It is necessary to be in agreement on this, in advance, in order to avoid misunderstanding which arises from foreign exchange fluctuations which might affect the actual cost of transportation, and from interest charges which might accrue under letter of credit financing. Hence, the seller should always prepay the ocean freight unless he has a specific agreement with the buyer, in advance, that goods can be shipped freight collect.

7. The buyer should recognize that he does not have the right to insist on inspection of goods prior to accepting the documents. The buyer should not refuse to take delivery of goods on account of delay in the receipt of documents, provided the seller has used due diligence in their dispatch through the regular channels.

8. Sellers and buyers are advised against including in a C.I.F. contract any indefinite clause at variance with the obligations of a C.I.F. contract as specified in these Definitions. There have been numerous court decisions in the United States and other countries invalidating C.I.F. contracts because of the inclusion of indefinite clauses.

9. Interest charges should be included in cost computations and should not be charged as a separate item in C.I.F. contracts, unless otherwise agreed upon, in advance, between the seller and buyer; in which case, however, the term C.I.F. and I (Cost, Insurance, Freight, and Interest) should be used.

10. In connection with insurance under C.I.F. sales, it is necessary that seller and buyer be definitely in accord upon the following points:

(a) The character of the marine insurance should be agreed upon in so far as being W.A. (With Average) or F.P.A. (Free of Particular Average), as well as any other special risks that are covered in specific trades, or against which the buyer may wish individual protection. Among the special risks that should be considered and agreed upon between seller and buyer are theft, pilferage, leakage, breakage, sweat, contact with other cargoes, and others peculiar to any particular trade. It is important that contingent or collect freight and customs duty should be insured to cover Particular Average losses, as well as total loss after arrival and entry but before delivery.

(b) The seller is obligated to exercise ordinary care and diligence in selecting an underwriter that is in good financial standing. However, the risk of obtaining settlement of insurance claims rests with the buyer.

(c) War risk insurance under this term is to be obtained by the seller at the expense and risk of the buyer. It is important that the seller be in definite accord with the buyer on this point, particularly as to the cost. It is desirable that the goods be insured against both marine and war risk with the same underwriter, so that there can be no difficulty arising from the determination of the cause of the loss.

(d) Seller should make certain that in his marine or war risk insurance, there be included the standard protection against strikes, riots and civil commotions.

(e) Seller and buyer should be in accord as to the insured valuation, bearing in mind that merchandise contributes in General Average on certain bases of valuation which differ in various trades. It is desirable that a competent insurance broker be consulted, in order that full value be covered and trouble avoided.

(VI) "EX DOCK (named port of importation"

NOTE: *Seller and buyer should consider not only the definitions but also the "Ex Dock Comments" at the end of this section (page 16), in order to understand fully their respective responsibilities and rights under "Ex Dock" terms.*

Under this term, seller quotes a price including the cost of the goods and all additional costs necessary to place the goods on the dock at the named port of importation, duty paid, if any.

Under this quotation:

Seller must

(1) provide and pay for transportation to named port of importation;
(2) pay export taxes, or other fees or charges, if any, levied becausse of exportation;
(3) provide and pay for marine insurance;
(4) provide and pay for war risk insurance, unless otherwise agreed upon between the buyer and seller;
(5) be responsible for any loss or damage, or both, until the expiration of the free time allowed on the dock at the named port of importation;
(6) pay the costs of certificates of origin, consular invoices, legalization of bill of lading, or any other documents issued in the country of origin, or of shipment, or of both, which the buyer may require for the importation of goods into the country of destination and, where necessary, for their passage in transit through another country;
(7) pay all costs of landing, including wharfage, landing charges, and taxes, if any;
(8) pay all costs of customs entry in the country of importation;
(9) pay customs duties and all taxes applicable to imports, if any, in the country of importation, unless otherwise agreed upon.

Buyer must

(1) take delivery of the goods on the dock at the named port of importation within the free time allowed;
(2) bear the cost and risk of the goods if delivery is not taken within the free time allowed.

Ex Dock Comments

This term is used principally in United States import trade. It has various modifications, such as "Ex Quay", "Ex Pier", etc., but it is seldom, if ever, used in American export practice. Its use in quotations for export is not recommended.

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IN THE

Supreme Court of the United States

October Term 1962

No. 858

YACIMIENTOS PETROLIFEROS FISCALES,
Petitioner,

against

PARAGON OIL CO., INC.,

and

REPUBLIC TANKERS, S. A.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Republic Tankers, S. A.,
26 Broadway,
New York 4, New York.

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A full and lucid statement of the facts in the case is contained in the opinion of the Court of Appeals for the Second Circuit, reported at 310 F. 2d 169, pp. 2a through 11a of petitioner's appendix to its brief. The detailed and meticulous findings of fact and conclusions of law of the trial court and its well considered opinion appear at pages A-12 through A-30 of the appendix below (Vol. I).

The gist of the decision is contained in the trial court's third conclusion of law, at A-29 of the appendix below:

> "The failure of respondent YPF to provide libellant's vessel with a safe berth was a breach of the

safe berth clause contained in the Affreightment Contract between respondent Republic and YPF and consequently a breach of the safe berth clause contained in the charter party between libellant and respondent Republic."

The decision followed well settled precedents which have consistently held a safe berth clause couched in the language present here as an "express warranty" that the berth designated by the petitioner here will be one "the vessel can proceed thereto, lie at, and depart therefrom always safely afloat * * *" *Cities Service Transp. Co.* v. *Gulf Refining Co.*, 2 Cir., 1933, 79 F. 2d 521, aff'g 9 F. Supp. 963; *Park S.S. Co.* v. *Cities Service Oil Co.*, 2 Cir., 1951, 188 F. 2d 804, cert. denied 342 U. S. 862 (p. A-26 of the appendix below, Vol. I).

Upon a careful review extending to all the petitioner's contentions on the facts, the trial court's findings and conclusions were affirmed by the Court of Appeals. Petitioner has already received a fuller review than the rule of *McAllister* v. *United States*, 348 U. S. 19, 20, would seem to warrant. No further review can be justified under that rule nor is any indicated by the contentions advanced by petitioner in the present petition for a writ of certiorari.

The Petition Does Not Satisfy the Requirements of Rule 19

The petition presents no special or important reasons for the granting of a writ of certiorari; it does not raise any issue which satisfies the criteria for review by certiorari established by Rule 19 of this Court.

The decision of the Court of Appeals for the Second Circuit is not in conflict with the decision of any other court of appeals. No important state or territorial ques-

tion has been decided in a way in conflict with applicable state or territorial law. There has been no decision on an important question of federal law which has not been, but should be settled by this court; nor is the decision below in conflict with applicable decisions of this court. The courts below have not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the court's power of supervision.

No Jurisdictional or Constitutional Question is Presented

Petitioner's assertions in this regard may be reduced to the twofold propositions that Republic's impleader of YPF falls outside the admiralty jurisdiction of the federal courts and that the retention of the matter on the admiralty side of the court has deprived petitioner of the right to a jury trial provided for in the Seventh Amendment.

A key premise to this argument is petitioner's assertion "that contracts to be enforceable in admiralty must be wholly maritime, and that contracts involving purchase and sale as well as transportation are not maritime contracts enforceable in admiralty" (p. 12 of petitioner's brief).

If, in fact, Republic's cause of action over against YPF is wholly (or essentially) maritime, if it lies within the admiralty jurisdiction, petitioner's "questions presented" on this score are non-existent. Respondent Republic believes it is readily demonstrable that such is the case.

Respondent Republic's impleading petition appears at pages A-71 through A-75 of the appendix below (Vol. I). In essence, as held by both courts below, it pleaded that if Republic was liable to Paragon for breach of the safe

berth warranty contained in its charter party with Paragon, YPF was likewise liable to it for breach of the safe berth warranty contained in the contract between YPF and Republic. That contract was stipulated in evidence and appears as Republic's appendix below (Vol. II).

It was the trial court's finding of fact as well as its conclusion of law that this contract was one of affreightment.

Finding No. 7 of the trial court was:

> "In December 1956, YPF entered into an agreement (Affreightment Contract) with respondent Republic for affreightment and transportation of the said seven cargoes of fuel oil to be delivered at YPF's option to either Buenos Aires or LaPlata, Argentina. (Purchase Order No. NY 1971, Rep. Ex. A.)"

The following finding (No. 8) notes the fact that this contract, as well as the contract with Paragon Oil Company, Inc. of Delaware (not a party to this action) for the purchase of the fuel oil, are upon printed Y.P.F. forms, designated as "Purchase Orders" which are stated to be "complementary" of each other and to be an integral part in all effects and results with the other.

Having noted this aspect of the form and language of the so-called "purchase orders", the subsequent findings of the court note various matters of substance in the contract such as the right of YPF to designate the discharge port (Finding No. 9), the safe berth provisions (Finding No. 10), the lighterage provision (Finding No. 11) and the exemptions clause (Finding No. 56). Throughout the court continues to characterize the contract between YPF and Republic as an Affreightment Contract.

Similarly, in its discussion on the law and its conclusions of law, the contract is referred to as an Affreightment Contract.

The trial court's conclusions of law and, in particular, its conclusion No. 1, are tantamount to a holding that admiralty jurisdiction is present.

The opinion of the Court of Appeals took explicit note of the form of the contract and of its appendages, as well as the statement that the two purchase orders "are only one order with Condition C. & F." (pp. 3a and 4a of the appendix to petitioner's brief). The Court of Appeals likewise construed the agreement between YPF and Republic as an Affreightment Contract.

In characterizing the contract in this fashion and in construing the contract according to the well settled law governing safe berth provisions both courts were entirely justified. Bouvier's Unabridged Law Dictionary (3rd ed., 1914) defines affreightment as follows:

> "The contract by which a vessel, or the use of it, is let out to hire".

De Kerchove's International Maritime Dictionary (2nd ed., 1961) has the following entry opposite "Affreightment":

> "A contract of affreightment is one with a shipowner to hire his ship or part of it for the carriage of goods. Such a contract generally takes the form of a charter party or a bill of lading. In French law, the terms freighting and affreighting have differing usages. The owner of a ship is called the freighter (*fréteur*); he is the lessor. The merchant is called the affreighter (*affréteur*); he is the hirer."

The leading English textual authority in the field, Scrutton, "Charterparties and Bills of Lading" (16th ed.,

1955), commences his work with a chapter entitled "The Contract of Affreightment". The opening paragraph of that work will stand as a definition of the term:

> "Article 1.—Nature of the Contract
>
> When a shipowner, or person having for the time being as against the shipowner the right to make such an agreement, agrees to carry goods by water, or to furnish a ship for the purpose of so carrying goods, in return for a sum of money to be paid to him, such a contract is called *a contract of affreightment* and the sum to be paid is called *freight*."

The petitioner does not dispute that a charter party is a contract wholly maritime and within the admiralty jurisdiction of the federal courts. Indeed, it could not well do so. 1 Benedict on Admiralty (6th ed., 1940) § 63. A contract of affreightment is no less a maritime contract and within the admiralty jurisdiction of the federal courts. Benedict, supra, § 66, where a contract "by one to furnish vessels and by another to furnish cargo for such vessels" is cited as an instance of a maritime contract.

In the case cited for this proposition by the author, *Graham* v. *Oregon R. & Nav. Co.*, 134 Fed. 454, 135 Fed. 608, the Court first rejected a libel as without the admiralty jurisdiction where it pleaded an agreement between a railroad company and the owner of certain steamships for arrangements for a through line of transportation. Upon leave to amend, the libellant recast the libel to plead an agreement for the furnishing of cargoes on the respondent's part and of steamships on the libellant's part to carry the cargoes. The amended libel, as was the case with the original libel, incorporated the entire terms

of the agreement. It was held, 135 Fed. 608, 611, that the amended libel was within the admiralty jurisdiction:

> "The allegations of the amended, libel, however, are quite different from those of the original. The agreement contained in Appendix "A", instead of being a statement of the terms of the agreement as formerly alleged, is now described as merely incidental to the main contract, which is set forth in the paragraphs quoted above. The allegations of the new libel set forth a contract for the furnishing of cargoes on the respondent's part and of steamships on the libellant's part to carry the cargoes. Such a contract is essentially maritime within the authorities. Quirk *v.* Clinton, 20 Fed. Cas. 146; Patterson *v.* Baltimore Steam Packet Co. (D.C.) 101 Fed. 296; Id., 106 Fed. 736, 45 C.C.A. 575, 66 L.R.A. 193; Id. (D.C.) 106 Fed. 957.

The hornbook authority on the admiralty law of this country is Robinson on Admiralty (1939). Under the subheading "Contracts for carriage by a vessel are maritime whether the ship is a common carrier or a chartered vessel", at page 185, the following appears:

> "Whether the shipowners' contracts for affreightment of cargo are maritime engaged the attention of the Supreme Court in New Jersey Steam Nav. Co. *v.* Merchants' Bank. In an opinion of historical value to the whole topic of admiralty contract, the court decided that the shipper who sent goods under a contract of carriage could sue in admiralty for the loss by fire of the goods. Of this case the Supreme Court in Morewood *v.* Enequist said: 'The whole subject was most thoroughly investigated. * * * Everything connected with the history of courts of admiralty from the reign of Richard the Second * * * was brought to our notice. We then decided that charter parties and contracts of

affreightment are "maritime contracts" within the true meaning and construction of the constitution * * * and recognized in courts of admiralty.' The subsequent judicial history of the topic is in accord with this view.

"The term 'charter party' may however be here given an explanation. In the Lexington and Morewood cases the ship was simply carrying package freight for which separate arrangements were made for each package or group of packages. As a 'general ship', the owner loads her by gathering cargo from many. In such a case his contract with each shipper is one of affreightment. It is likewise called 'affreightment' if he operates his own ship but carries in her the cargo of a single person. Yet in that case the arrangement is also called a 'charter' and is again distinguished from a 'demise' of the ship. The last mentioned is also a charter but in such form that the charterer himself operates the vessel. The distinction between the forms of the charter is important in determining the liabilities of the ship owner and the cargo owner, both to each other and to third parties. At the present time it is only necessary to say that all these contracts are so far maritime as to fall within the admiralty jurisdiction, as do passenger contracts" (Footnotes omitted).

See, also, Gilmore & Black "The Law of Admiralty" (1957) § 1-10, pp. 20-21.

Petitioner's contentions with respect to the jeopardy said to be involved for the Revised American Foreign Trade Definitions adds nothing to its argument, since two "complementary" contracts under which the purchaser buys goods on the one hand and on the other hand buys transportation for such goods is in no sense a C. & F. contract under the American Foreign Trade Definitions

or any other definitions. The fact that YPF saw fit to insert the language it now relies upon can in no way alter this reality. Calling a contract, or a set of contracts, "C. & F." will not make them so if they are not such in fact. It requires no citation of authority to sustain the proposition that the courts will look to substance rather than form when it is necessary to determine the actual nature of an agreement.

It is also perhaps too obvious to require saying that any contract for the carriage of goods, or hire of a vessel, or for maritime transportation is the purchase by one party and the sale by another of carriage or the means for such carriage.

It should be noted here that the thrust of the petitioner's assertions on this point are not directed to the merits of the suit below but to the proposition that it was entitled to a trial of the merits on the civil side of the court and with the right to a jury. In this connection it should be pointed out that the time honored mode for challenging the admiralty jurisdiction of the federal courts is by exceptions duly and timely taken. As Benedict, *supra*, Volume 2, § 333, observes:

> "* * * in the absence of exceptions filed the court will be slow to listen to any objections whether to form or substance"

and elsewhere, in the same section, the author states:

> "Exceptions must be taken promptly within the time limited by the district court rules and a failure to file exceptions is a waiver of the right to except."

It is not necessary to challenge the undoubted right of any court to take under advisement the question whether jurisdiction over the subject matter is present to make the

point that petitioner's contentions in this regard come as an eleventh-hour afterthought and are inferentially suspect on their merits. The first active assertion by the petitioner that there was any defect in the admiralty jurisdiction of the court came in the brief filed by it upon its second petition for a rehearing by the Court of Appeals.

It should also be noted that the Court of Appeals for the Second Circuit, in *James Richardson & Co.* v. *Connors Marine Co.*, 141 F. 2d 226, sanctions the retention of a case originally brought in admiralty on the civil side of the court where admiralty jurisdiction is negatived if it is shown that diversity jurisdiction exists.[1] The Court there stated at p. 229:

> "* * * Moreover, acceptance of respondent's contention would not lead to reversal and dismissal of the action, as it claims, but merely dismissal of the appeal (as allowable only from an *interlocutory* decree in admiralty, 28 U.S.C.A. §227, Jud. Code §129, as amended) and continuance of the action at law with the commissioner treated as a master under F.R.C.P. 53(a). For here all the facts showing diversity jurisdiction are presented, and it is well settled that under such circumstances an action shall be treated as within that jurisdiction where appropriate, even though it may have been commenced in admiralty. Moran Towing & Transportation Co. v. Navigazione Libera Triestina, S.A., 2 Cir., 92 F. 2d 37, 39, certiorari denied 302 U. S. 744, 58 S. Ct. 145, 82 L. Ed. 575; Admiral Oriental Line v. United States, 2 Cir., 86 F. 2d 201, 203; Prince Line v. American Paper Exports, Inc., 2 Cir., 55 F. 2d 1053; Cory Bros. & Co. v. United States, 2 Cir., 51 F. 2d 1010; Louis Dreyfus

1. Diversity jurisdiction is also present in this case since the libellant is a New York corporation, Republic a Panamanian corporation and YPF a corporate agency of the Republic of Argentina.

> v. Paterson Steamships, 2 Cir., 43 F. 2d 824, 72 A.L.R. 242; Owens v. Breitung, 2 Cir., 270 F. 190; United States ex rel. Pressprich & Son Co. v. James W. Elwell & Co., 2 Cir., 250 F. 939, certiorari denied 248 U. S. 564, 39 S. Ct. 8, 63 L. Ed. 423."

With respect to petitioner's belated invocation of the Seventh Amendment, a sufficient answer is found in Rule 38 of the Federal Rules of Civil Procedure, under which the failure of a party to serve a demand for a jury as required by Rule 38(b), namely no later than ten days after the service of the last pleading directed to any issue triable of right by a jury, and to file such demand as required by Rule 5(d) of the same Rules, constitutes a waiver of the right to trial by a jury.

Petitioner's Charges of Collusion Have Been Found and Held Without Merit

On this score petitioner is belaboring a much flogged mule. Petitioner's exposition on this point, at page 28 of its brief, contains a flagrant misstatement of fact. It is there stated that "it was not until after the conclusion of the trial and while the appeal was pending in the Court of Appeals that petitioner's counsel learned that libellant and Republic were of common ownership". This statement is wholly untrue. Both counsel for petitioner and the trial judge were informed prior to the trial that the libellant and Republic were affiliated companies.

The Court of Appeals' opinion reveals a thorough-going scrutiny of these charges. The Court of Appeals held:

> " * * * The Court was not deceived as to the course Republic was taking, Republic's abstentionist position having been plain from the beginning, and it is

hard to see that YPF suffered any prejudice thereby. YPF knew about the nature of the representation of Republic from the outset of the litigation * * * Even if YPF is entitled to have the separate entities of the congeries of Schwartz-owned corporations disregarded, it would be liable none the less, since the ultimate responsibility to provide a safe berth rested on it; and the true party in interest would still be American. Indeed, we see no reason why libellant's direct claim against YPF should not have been sustained, on a theory akin to the liability to the shipowner of a stevedoring company that contracts with a charterer, Crumady v. The J. H. Fisser, 358 U. S. 423, 428 (1950), or even with a consignee, Waterman S. S. Corp. *v.* Dugan & McNamara, Inc., 364 U. S. 421, 423-425 (1960). *Neither are we told of any substantial defenses that an independent proctor could have interposed for Republic with any hope of success.* The main suggestion is that something could have been made of the fact that Milanowski worked also for Circle Shipping, another Schwartz-owned corporation which was agent for libellant as well as for Republic, so that any fault on his part would defeat the recovery by the former against the latter. A sufficient answer is that we discern no fault to impute. (Emphasis supplied)" (pp. 10a and 11a of appendix to petitioner's brief)

The authorities relied upon by petitioner under this heading are substantially the same as those urged upon the Court of Appeals. These cases may be summarized as involving situations in which an unrepresented third party or parties were placed in jeopardy by a contrived suit in which the real issue, if any, had no adversary representation. Moreover, none of these authorities deal with instances of impleader, a practice which has been a

commonplace in maritime litigation since the predecessor of the present Rule 56 of the Supreme Court Admiralty Rules was adopted by this Court.

If the fact was that the damages and expenses complained of in this libel had been incurred by the respondent Republic, a direct action in admiralty against YPF would have been available to Republic. The fact that the recovery adjudged against YPF here has arisen by way of impleader has altered YPF's rights not one whit.

The Petition for a Writ of Certiorari Should Be Denied.

Respectfully submitted,

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FILED
APR 3 1963
JOHN F. DAVIS, CLERK

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The full facts in this case are set forth in the trial court's opinion (pp. A-12 through A-30 of the appendix below—Vol. I) and in the affirming opinion of the Court of Appeals for the Second Circuit, reported at 310 F. 2d 169 (pp. 2-A through 11-A of the petitioner's appendix to its brief). Respondent Paragon Oil Co., Inc. (Paragon hereinafter) therefore sees no need to burden this Court's time with a repetition of the facts and findings as therein

set forth. Suffice it to say that the gist of the trial court's decision was:

> "The failure of respondent YPF to provide libellant's vessel with a safe berth was a breach of the safe berth clause contained in the Affreightment Contract between respondent Republic and YPF and consequently a breach of the safe berth clause contained in the charter party between libellant and respondent Republic" (A-29, Appendix, below).

Petitioner has nowhere in its petition demonstrated any basis for the granting of a writ of certiorari to the Court of Appeals for the Second Circuit. While petitioner attempts to lead the Court to believe that the petition should be granted because of the presence of constitutional issues and that meritorious questions of law have been ignored by the trial and appellate courts, a short review of the background of this litigation shows that all that the petitioner now asserts has been fully dealt with below, and that there are no questions which merit consideration by this Court.

Petitioner has attempted to make complex a relatively simple and routine species of admiralty suit. This is not a case where petitioner makes out a showing that it has not had a full and thorough trial on the merits. All the claims asserted by petitioner at any time in this litigation, including those re-asserted in the petition for certiorari, were fully and properly dealt with by the courts below in accordance with well settled law. In fact, petitioner has received more attention for its contentions than would ordinarily be expected in any litigation, since in addition to the trial and review on appeal, petitioner had two separate petitions for rehearing considered by the Court of Appeals, both of them denied.

The history of this litigation demonstrates that the petitioner does not meet the requirements for certiorari.

The litigation here involved is a simple one. Paragon, as bareboat chartered owner of the SS GREENPOINT, filed a libel in admiralty in the United States District Court for the Southern District of New York against its charterer, respondent Republic Tankers, S.A. (Republic), and against petitioner, to recover for damage to the vessel as a result of grounding at an unsafe discharge berth in Buenos Aires designated by the petitioner. The libel was based upon the failure of petitioner and Republic to comply with a safe berth warranty and alternatively on the negligence of petitioner in designating and furnishing a known unsafe berth to the vessel. The safe berth clause of the charter party between Paragon and Republic read as follows:

> "6. SAFE BERTH. SHIFTING. The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided that the vessel can proceed thereto, lie at, and depart therefrom always safely afloat; any lighterage being at the expense, risk and peril of the Charterer." (See Appendix to brief of libellant, below)

Republic admitted the existence of the safe berth clause in its charter with Paragon. The safe berth clause in the contract between Republic and YPF was identical with that contained in the Paragon charter party except for the deletion of certain language which applied only to the loading port. Republic therefore claimed that if any damage

was sustained by the vessel from grounding at the berth designated by YPF the liability was that of the petitioner, YPF. Republic thereupon moved to implead the petitioner in order to protect its right over against them.

Petitioner in unsuccessfully opposing the motion by Republic, first argued its theory of "collusion". The District Judge rejected this argument and granted the motion to implead.

Petitioner in its answer to the libel, while admitting that the vessel arrived in Buenos Aires with a cargo to be delivered to it, denied any liability either to Paragon or to Republic. The answer further pleaded as defenses the following:

1. The libel failed to state facts sufficient to constitute a cause of action;
2. Libellant was not the real party in interest;
3. The negligence, if any, was in whole or in part that of libellant;
4. Libellant assumed the risk of the grounding;
5. Petitioner was absolved of any responsibility by reason of a general "strike clause"; and
6. The fault, if any, was that of respondent, Republic.

The trial judge, after an extended trial, filed a lengthy opinion containing meticulous findings of fact and conclusions of law holding both Republic and petitioner liable. The trial court disposed of these defenses of petitioner, as well as its contentions with regard to "collusion", and pointed out that the real issue was whether there was damage to the vessel resulting from YPF's designation of an unsafe berth.

Petitioner in its appeal to the Circuit Court of Appeals, again urged its six "defenses" and again, at some length,

pressed its contentions on the alleged "collusion". It also raised, for the first time, upon the second motion for rehearing, its contentions with respect to the claimed defect in the admiralty jurisdiction of the trial court. In fact, everything that is urged in the petition for certiorari has been before the Circuit Court with one noteworthy modification in emphasis.

Petitioner, in its brief, arguments and petitions for rehearing before the Circuit Court, devoted most of its time and space to the argument on collusion and only upon the second motion for a rehearing devoted any attention to the alleged jurisdictional issue. Petitioner obviously at long last has recognized the weakness of its argument on "collusion", since it now makes it a minor point of the petition and tries to make the jurisdictional issue its major argument. However, here again nothing new is added, irrespective of the emphasis which petitioner has now tried to place on its arguments.

The Court of Appeals in its opinion thoroughly dealt with petitioner's two major arguments presently asserted in the petition. With respect to the alleged collusion the Court of Appeals stated in part:

> "* * * The Court was not deceived as to the course Republic was taking, Republic's abstentionist position having been plain from the beginning, and it is hard to see that YPF suffered any prejudice thereby. YPF knew about the nature of the representation of Republic from the outset of the litigation * * * Even if YPF is entitled to have the separate entities of the congeries of Schwartz-owned corporations disregarded, it would be liable none the less, since the ultimate responsibility to provide a safe berth rested on it; and the true party in interest would still be American. Indeed, we see no reason why libellant's direct claim

against YPF should not have been sustained, on a theory akin to the liability to the shipowner of a stevedoring company that contracts with a charterer, Crumady v. The J. H. Fisser, 358 U. S. 423, 428 (1950), or even with a consignee, Waterman S. S. Corp. v. Dugan & McNamara, Inc., 364 U. S. 421, 423-425 (1960.) *Neither are we told of any substantial defenses that an independent proctor could have interposed for Republic with any hope of success.* The main suggestion is that something could have been made of the fact that Milanowski worked also for Circle Shipping, another Schwartz-owned corporation which was agent for libellant as well as for Republic, so that any fault on his part would defeat the recovery by the former against the latter. A sufficient answer is that we discern no fault to impute." (Emphasis supplied.) (pp. 10a and 11a of appendix to petitioner's brief)

With respect to the alleged lack of jurisdiction, the Court of Appeals held that the agreement between Republic and YPF was a contract of affreightment, long a clearly recognized basis for admiralty jurisdiction. However, the Court of Appeals went further and pointed out that irrespective of the written contractual documents, there was a basis for recovery on libellant's direct claim in accordance with the principles of the *Crumady* and *Waterman* cases, cited *supra*.

The right of Paragon to a direct recovery against petitioner, and the concomitant admiralty jurisdiction to enforce same are also supported by the principles enunciated in *Nassau Sand & Gravel Co.* v. *Red Star T. & T. Co.* (CA 2 1932), 62 F. 2d 356.

That case involved a grounding of a barge at a dock designated by the charterer. There was no written safe berth clause, the barge owner relying on the fact that the

charterer having designated the berth, there was an implied warranty that it was a safe one. The Court of Appeals for the Second Circuit held that damages should be divided between the parties and reaffirmed the rule that a safe berth assurance need not be in writing in the following language:

> "The respondent does not assert that the tug was not liable for leaving the barge at another berth than that agreed upon. We are therefore concerned only with the duties of the bargee in the circumstances, and how far his faults relieve it. We have held that if he is assured that the berth is safe, and acts upon that assurance, he need not sound. The Eastchester, 20 F. (2d) 357. If he is so assured, but does not accept the assurance, and sounds, but sounds ineffectively, the damages will be divided. The Bleakley No. 76 (C.C.A.) 54 F. (2d) 530. If he has no assurance beyond the mere fact that he is given the berth, he must sound. The B.B. No. 21 (C.C.A.) 54 F. (2d) 532; Hirsch Lumber Co. *v.* Co. Ottaviano & Co. (C.C.A.) 18 F. (2d) 952; The Dave & Mose (Fahey *v.* New York), 49 F. 389 (D.C.) affirmed Fahy *v.* N. Y. (C.C.A.) 61 F. 336; Sinram *v.* Pennsylvania R. Co. (C.C.A.) 61 F. (2d) 767."

Petitioner YPF, after the Court of Appeals rendered its opinion affirming the District Court, filed a petition for rehearing. The Court of Appeals after due consideration denied this petition.

Petitioner thereafter filed a second petition for a rehearing urging the points relied upon in its present petition with equal length and verbosity. The Court of Appeals considered this second petition and denied it.

Petitioner is thus in the position of one who has unsuccessfully urged its so-called grounds for review on two

occasions before the District Court, three occasions before the Court of Appeals and now for the sixth time in its petition to this Court. Petitioner's arguments have not improved either with age or repetition.

The petitioner instead of facing the issues dealt with by the District Court and the Court of Appeals urges points of alleged international trade usages with the obvious intent of impressing upon this Court the suggestion that there is involved in this case some question of the rights of a friendly foreign sovereign, Argentina. Paragon respectfully submits that the petition has not demonstrated such issues are present, and cannot so demonstrate, since none in fact exist.

The petitioner attempts to suggest veiled intimations that its right to invoke sovereign immunity has in some way been prejudiced. Paragon submits that any such argument is specious since if petitioner seriously intended to assert sovereign immunity not only would it so state, but also, as this Court may note, its right to assert the same may be invoked whenever effort is made to collect on the judgment. *Dexter & Carpenter, Inc. v. Kungliga Jarnvagsstyrelsen, et al.* (CA 2 1930) 43 F. (2d) 705, cert. den. 282 U. S. 896.

The petition presents no special or important reasons for the granting of a writ of certiorari, nor does it raise any issue which satisfies the criteria for review established by Rule 19 of this Court.

The decision of the Court of Appeals for the Second Circuit is not in conflict with the decisions of any other court of appeals. The opinions of both courts below followed well established precedents which have consistently held a safe berth clause in the language here present to be an "express warranty" that any damage suffered by reason of furnishing an unsafe berth renders

the warrantor liable to respond to the warrantee for such damage:

Cities Service Transp. Co. v. *Gulf Refining Co.*, 2 Cir., 1933, 79 F. 2d 521, aff'g 9 F. Supp. 963; *Park S.S. Co.* v. *Cities Service Oil Co.*, 2 Cir., 1951, 188 F. 2d 804, cert. denied 342 U. S. 862.

The record discloses that this case does not involve an important state or territorial question; that it does not involve a decision on an important question of federal law which has not been but should be settled by this Court; nor is the decision in conflict with the applicable decisions of this Court. The courts below have not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The petition therefore does not satisfy the criteria of this Court's rule for review and therefore should be denied.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FILED
MAY 10 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 858

YACIMIENTOS PETROLIFEROS FISCALES,
Petitioner,

against

PARAGON OIL CO., INC.,

and

REPUBLIC TANKERS, S. A.,
Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM 1962

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YACIMIENTOS PETROLIFEROS FISCALES,
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Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pursuant to Rule 58, par. 2, of the Rules of the Supreme Court of the United States, Petitioner Yacimientos Petroliferos Fiscales, petitions for a rehearing on its petition for a writ of certiorari, heretofore denied.

Jurisdiction

A timely petition for certiorari showing jurisdiction under 28 U. S. C. §§ 1254(1) and 2101(c) was denied by this Court on April 15, 1963; and this petition for rehearing is filed under par. 2 of Rule 58 of the Rules of the Supreme Court of the United States.

Questions For Special Reconsideration

1. Whether the making between Republic and libellant of their March 16, 1957 contract, their operating thereunder, and the transportation by libellant for Republic of one cargo pursuant thereto, constituted a deviation from the December 1956 contract between Republic and Petitioner, and displaced, vitiated, avoided, forfeited, wiped out and disentitled either Republic or libellant from invoking or claiming the benefit of the safe berth clause contained in the December 1956 contract.

2. Whether the making of the March 16, 1957 charter party contract subsequent to and deviating from the December 1956 contract between Petitioner and Republic distinguishes cases such as *Constantine & Pickering SS Co.* v. *West India SS Co.*, 199 Fed. 964; *Cities Service Transp. Co.* v. *Gulf Ref. Co.*, 79 F. 2d 521 and *Park SS Co.* v. *Cities Service Oil Co.*, 188 F. 2d 804, relied on by respondents and the Courts below.

3. Whether Republic, after having made at least two cargo deliveries, with lighterage at Interseccion, and being fully acquainted with the tidal nature of the harbor and berth and that the vessel could not at all times remain afloat fully loaded, could make on March 16, 1957 a safe berth clause charter party and maintain this was in reliance on attributing safe meaning to the safe berth clause of the December 1956 contract.

Grounds for Rehearing

I. In *Calmar SS Corp.* v. *Scott*, 345 U. S. 427, 428, the Court, by FRANKFURTER, J., stated:

> "We granted certiorari, 344 U. S. 853, because wide use, so the Court was advised, of the clauses of this policy makes their construction, a necessary issue here, a matter of more than individual concern."

To an equal or greater degree, we submit, the "wide use" of the WARSHIPOILVOY (Rev.) form of safe berth clause in mercantile and transportation contracts, differing greatly as to parties and terms, "makes their construction, a necessary issue here, a matter of more than individual concern" (345 U. S. 428).

The denial of the petition for certiorari herein must have been influenced by failure of Petitioner's counsel to express this adequately, and resulting failure of this Court to appreciate its importance and the importance of determining whether the making by Republic and libellant of the March 16, 1957 charter contract, their operating thereunder, and the transportation by libellant for Republic of one cargo pursuant to its terms and conditions constituted a deviation from the terms and conditions of the December 1956 contract between Petitioner and Republic.

The Court of Appeals, with reference to the December 1956 Purchase Order No. N. Y. 1971 between Petitioner and Republic stated that:

> "The Affreightment Contract, *like so many commercial agreements*, 'carries its endorsements like boating flapping in all directions' . . . . One of these appendages was a photostatic copy of some clauses from the same form of charter party, Warshipoilvoy (Rev.), used by Paragon and Republic in their Voyage Charter, among them the [safe berth clause]. Thus, so far as here relevant, the Voyage Charter and the Affreightment Contract had *identical* safe berth clauses." (Italics ours)

The very expression "like *so many* commercial agreements"* is indicative of the "wide use" (345 U. S. 428)

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* Compare this Court's statement respecting clauses made by riders which the Court construed in *Calmar SS Corp. v. Scott*, *supra*, 345 U. S. 427, 432, that:

> "Construing such conglomerate provisions requires a skill not unlike that called for in the decipherment of palimpsest texts" (345 U. S. 432).

which in *Calmar SS Corp. v. Scott*, *supra.*, occasioned the grant of certiorari.

It is "a necessary issue here" (345 U. S. 428) whether the one safe berth clause, in and subject to the terms and conditions of and between the parties to the one contract, is or is not properly held "identical" with the other safe berth clause, which is in and subject to the different terms and conditions of and between the different parties to the other contract.

The respondents herein have contended and the lower Courts have held that they are "identical" because both contracts use the text of par. 6 of Part II of the WARSHIPOILVOY (Rev.) form, and that, such one clause being "identical", the case is indistinguishable from decisions such as *Constantine & Pickering SS Co.* v. *West India SS Co.*, 199 Fed. 964; *Cities Service Transp. Co.* v. *Gulf Ref. Co.*, 79 F. 2d 521 and *Park SS Co.* v. *Cities Service Oil Co.*, 188 F. 2d 804 relied on by respondents and the Courts below. This is the basic ground of the claims sued on by the respondents, and the basic premise also of the decision of the Court below.

But this, and the further reasoning of the Court of Appeals based thereon, ignores and conflicts with the uniform principle of contract law and decisions of this and other Courts establishing that any clause may have different meaning in different contracts because it must be construed in each instance in light of the parties, dates, circumstances and other express provisions of each contract in which it is used. It ignores and conflicts also with the principle of deviation, and with decisions of this and other courts establishing that if a party to an earlier contract (e. g. Republic, after becoming a party to the December 1956 contract with Petitioner) thereafter deviates therefrom or makes a subsequent contract with a stranger to the first one (e. g. Republic, by its March 16, 1957 contract with libellant, a stranger to the December 1956 contract of Petitioner) which involves deviation from the first, this deviation can-

not modify the first but, if carried into effect by the deviating contractor, will deprive him of the benefit of all clauses of the first contract in his favor.

"The general rule undoubtedly is that, if the shipowner commits a breach of the contract of affreightment which goes to the essence of the contract, he is not entitled after such breach to invoke the provisions of the contract which are in his favor" (*The Sarnia*, 2 Cir., 278 Fed. 459, 461, cert. denied 258 U. S. 625); "the bill of lading and all its clauses were wiped out, and the ship cannot claim the benefit of any limitations therein contained. *The Sarnia, supra.* . . . the shipowner who has deviated cannot claim the benefits of the terms of the bill of lading. It vitiates and avoids the contract of carriage" (*The St. Johns N F*, 2 Cir., 280 Fed. 553, 556, affd. by this Court, *St. Johns N F Shipping Corp.* v. *S. A. Companhia Geral Commercial Do Rio De Janeiro*, 263 U. S. 119, 124, where the Court said that "She accordingly became liable as for a deviation and cannot escape by reason of the relieving clauses inserted in the bill of lading for its benefit". "The benefit of all of these provisions was forfeited" (*Pacific Coast Co.* v. *Yukon Independent Transport Co.*, 9 Cir., 155 Fed 29, 37). See also the railway cases of *McKahan* v. *American Express Co.*, 209 Mass. 270, cited in *The Sarnia; supra*, as analogous; and *Benoit* v. *Central Vermont Railway*, 116 Vt. 266, 33 A. L. R. 2d 139 and note "Deviation by Carrier in Transportation of Property", 33 A. L. R. 2d 145-234, particularly §§ 22, 25 and 35, pp. 193, 199, 217-218.

Analogous also are cases of suretyship and guaranty holding that if the indemnitee, by contract or conduct subsequent in date, deviates from or fails to conform to the first contract, thereby introducing "a risk of a very different character from that which the defendant assumed" this will "preclude a recovery thereon" (*Tradesmen's Nat. Bank* v. *Nat. Surety Co.*, 169 N. Y. 563, 567; *Page* v. *Krekey*, 137 N. Y. 307, 314).

That there was "deviation" here is unquestionable under the authorities, "In other words, a 'deviation' from the agreement" (*Smith Kirkpatrick & Co.* v. *Columbian SS Co.*, 5 Cir., 88 F. 2d 392).

This Court has held that "In making a contract, parties are as important an element as the terms with reference to the subject matter. Mutual assent as to both is alike necessary. . . . A new party could no more be imported into the contract and imposed upon the bank without its consent, than a change could be made in like manner in any other preexisting stipulation" (*National Bank* v. *Hall*, 101 U. S. 43, 50). See also *Arkansas Smelting Co.* v. *Belden Co.*, 127 U. S. 379, 387; *Boston Ice Co.* v. *Potter*, 123 Mass. 28, 30, and *Schmaling* v. *Thomlinson*, 6 Taunt. 147, 128 Eng. Reprint 989, cited in the Petition for Certiorari, p. 29.

The December 1956 contract, Purchase Order No. N. Y. 1971, was between Petitioner and Republic, and was expressly made "intransferable". Republic, therefore, could not assign it in whole or in part to libellant. But to attempt by the March 16, 1957 contract between Republic and libellant to have libellant become carrier for one cargo, though not purporting to assign to libellant an interest in the December 1956 contract of Petitioner, constituted a deviation, substituting for the making of one voyage "A new party" as definitely as would have been an attempt at prohibited assignment.

In *Goodrich* v. *Thompson*, 44 N. Y. 324, 334, the deviation was the use of a different vessel than that designated in the contract. The Court said that:

> "That would justify a control over property which was never authorized. A specific agreement to do an act in a certain manner is not satisfied by an attempt to do it in another and a failure to accomplish the object."

The use of a different company, libellant, than that designated in the contract, Republic, to even greater de-

gree was the substitution of "a control over the property which was never authorized", than would have been the use of an unauthorized vessel.

Republic, being unable under its "indivisible intransferable" contract of December 1956 to assign or transfer to libellant the safe berth clause therein, its making of the March 16, 1957 contract with libellant containing a safe berth clause of its own was a deviation which, in accord with the authorities above cited "wiped out", "vitiates and avoids", "forfeited" and precluded either Republic or libellant from claiming the benefit of *(The St. Johns N F, supra)* the safe berth clause of the December 1956 contract.

Obviously this "added so notably to the risks of the prescribed voyage that the voyage ceased to be the same" *(Calmar SS Corp. v. Scott*, 2 Cir., 197 F. 2d 795, 801) as any contracted for by Petitioner under the December 1956 contract. Libellant, under the March 26, 1957 contract with Republic, was interested only in one cargo delivery, and this at rates far less than those provided between Petitioner and Republic in their seven cargo December 1956 contract. The high profits available to tankers at the time, due to the Suez Canal closure, made a one cargo carrier such as libellant much more eager to enter, deliver and depart quickly, than a seven cargo contractor such as Republic having its highly profitable December 1956 contract with Petitioner.

Further and fatal deviation was involved by opposite treatment in the two contracts of clause "28. LIBERTY CLAUSES," by which Petitioner and Republic provided for, but Republic and libellant eliminated, the important discretion exercisable by a master. That clause provides:

> "28. LIBERTY CLAUSES. (a) In any situation whatsoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the . . . Master is likely to give rise to risk of . . . damage, delay or disadvantage to or loss of the Vessel . . . or to make it unsafe, impru-

> dent . . . for any reason . . . to enter or discharge the cargo at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge in such port, . . . the . . . Master, whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the cargo there, may discharge the cargo into depot, lazaretto, craft or other place; or the Vessel may proceed or return, directly or indirectly, to or stop at any such port or place whatsoever as the Master . . . may consider safe or advisable under the circumstances, and discharge the cargo, or any part thereof, at any such port or place; or . . . the Master may retain the cargo on board . . . until such time as . . . the Master thinks advisable and discharge the cargo at any place whatsoever as herein provided or . . . the Master may discharge and forward the cargo by any means at the risk and expense of the cargo."

It was specifically provided by a typewritten clause of the December 1956 contract, Purchase Order No. N. Y. 1971, between Petitioner and Republic, that "Clauses . . . 28 . . . of Part II of Warshipoilvoy (rev.) 11/1/45, will apply to this Purchase Order to the extent that they do not change the character of this purchase order from that a C & F purchase made by Y. P. F. as per this purchase order complementary of Purchase Order NY-1970."

By contrast, it was specifically provided by a typewritten clause of the March 16, 1957 contract between Republic and libellant that "2. It is understood and agreed that clauses 27 through 31 of Part II hereof deleted."

It was held over 160 years ago that instructions from an owner limiting the discretion of the Master constitutes a deviation (*Middlemoss* v. *Blakes*, (1797) 7 T. R. 162, 101 Eng. Reprint 911; 1 Arnould on Marine Insurance (1961 Ed.) § 443, p. 417; 5 Couch Cyclopedia of Insurance Law § 1073q). Here, by the charter party contract under which he operated the Master's discretion was eliminated.

Thereby both the meaning of the safe berth clause was affected, and the risk greatly changed and increased from that which would have existed under the December 1956 contract. This was of special importance in connection with determination by him and the pilot upon arrival of the vessel at Interseccion (The Roads) whether to lighter there, or at least to wait there until it could be definitely ascertained that the berth was available; i.e., until assured that the Esso barge had vacated the berth. Petitioner has contended that it was negligent of the Master to proceed in from Interseccion with knowledge that at last report the Esso barge was still occupying the berth; and without ascertaining whether (as was the fact) Milanowski intended and was about to proceed out to Interseccion to arrange for lightering there. Even the question of the Master's negligence must be different, however, under the March 16, 1957 agreement (with his discretion eliminated) than would that of a Master operating under the December 1956 agreement (which provided for the Master's discretion). Equally the question of Milanowski's negligence is different under the two contracts. Knowing, as he must have, of the March 16, 1957 contract which deleted the Master's discretion, Milanowski's responsibility and duty was absolute to give the Master specific instructions to wait at Interseccion until he arrived there with the officials to arrange for lighterage.

The original Petition for Certiorari herein (p. 18) emphasized the "wide recognition and use by buyers and sellers throughout the world" which has been accorded to the "Revised American Foreign Trade Definitions—1941", used in the December 1956 contract but not in the March 16, 1957 charter contract between Republic and libellant. This statement at p. 18 was in point "I" of the Petition (pp. 10-18) relating to the non-maritime nature, for jurisdictional purposes, of Petitioner's indivisible intransferable C & F contract, consisting of the two complementary purchase Orders 1970 and 1971.

But reexamination of the Petition, and particularly the contention in point "VI" thereof (Petition for Certiorari,

pp. 35-40) that "a safe berth clause is not an abstract warranty" (id., p. 35) and point "IV" (id., pp. 29-33) discloses that counsel failed therein to express adequately and with equal emphasis the "wide use" (345 U. S. 428) of the WARSHIPORLVOY (Rev.) par. 6 safe berth clause in differing mercantile and transportation contracts. And your Petitioner submits that the application should be reconsidered in light of this fact that the "wide use" (345 U. S. 428) in mercantile and transportation contracts of safe berth clauses so worded "makes their construction, a necessary issue herein, a matter of more than individual concern" (345 U. S. 428); that they must be construed in light of the differing parties, differing circumstances, and other express provisions of the differing contracts in which they are incorporated; that this the Courts below have failed to do; that determination should be made of the important questions of deviation and the effect of deviation herein; and that this, "a necessary issue here", is definitely "a matter of more than individual concern" (345 U. S. 428).

II. The fact that the March 16, 1957 charter party between Republic and libellant was made two and a half months *subsequent* to Petitioner's December 1956 agreement with Republic itself distinguishes the safe berth clause decisions relied on by respondents and the Courts below. The distinction is absolute, and the principle involved in those decisions violated, when there is taken into account the point above noted that the *subsequent* agreement here involved constitutes a deviation from the earlier one. In *Constanting & Pickering SS Co.* v. *West India SS Co.*, 199 Fed. 964; *Cities Service Transp. Co.* v. *Gulf Ref. Co.*, 79 F. 2d 521; *Park SS Co.* v. *Cities Service Oil Co.*, 188 F. 2d 804 and similar cases relied on by respondents and the Courts below, no difference in meaning and no fact or question of deviation could arise because the making of the charter party or bill of lading *preceded* the undertaking by the subcharterer or consignee, and the subcharterer or consignee by contract *thereafter* made, upon or with reference to the already existing charter or bill of lading, in effect adopted all of its provisions.

Here no attempt was made by Republic or libellant to have libellant operate under the December 1956 agreement, as Republic's agent or otherwise. Rather, libellant could and did operate only under the March 16, 1957 charter party agreement. And no attempt was made by Republic or libellant to have Petitioner adopt, approve, ratify or become a party to the March 16, 1957 charter party agreement. That they had no intention of doing so is manifest from the special provision typewritten into the charter party that "2. It is understood and agreed that clauses 27 through 31 of Part II hereof deleted." Clause 27, entitled "ASSIGNMENT", thus deleted, would have provided that, subject to the owner's approval, "the Charterer shall have the option of subletting or assigning this Charter to any individual or company, but the Charterer shall always remain responsible for the due fulfillment of this Charter in all its terms and conditions." It thus was impossible for Republic to assign or transfer to libellant any of Republic's rights or duties under the "intransferable" December 1956 contract with Petitioner, and impossible for Republic to assign or transfer to Petitioner any of Republic's rights or duties under the March 16, 1957 contract with libellant. The decision of the Courts below thus presents a most "serious question" (*Costabile* v. *National Steamship Co.*, 154 U. S. 51, 71), entirely different from the question involved in *Constantine & Pickering SS Co.* v. *West India SS Co.*, *Cities Service Transp. Co.* v. *Gulf Ref. Co.*, and *Park SS Co.* v. *Cities Service Oil Co.*, relied on by respondents and the Courts below, and which this Court should review and for this purpose should reconsider and grant your Petitioner's application for certiorari.

III. Of certain of the clauses involved in *Calmar SS Corp.* v. *Scott*, *supra*, 345 U. S. 427, 440, the Court said:

> "If they are both written for a voyage, there is an implied warranty that *no different* voyage will be undertaken. But it is a warranty which must be construed in light of the *express provisions* of the policy, and which *may mean different things in different policies*" (345 U. S. 440) (Italics ours).

Here, as of March 16, 1957, Republic, having made at least two cargo deliveries (the record does not disclose whether it was two or three) under the December 1956 agreement with Petitioner, during which it fully learned, if it did not previously appreciate, the tidal nature of the Buenos Aires harbor, and during each of which lighterage had been had at Interseccion (The Roads), and being bound for the transportation and delivery of the remainder of the seven cargoes, was bound by at least an implied warranty that this knowledge and experience would not be ignored; and, because the December 1956 contract was by its express provisions both "intransferable" and "indivisible", this was either an express warranty or at least an implied warranty that "no different" carrier and "no different" contract would be used.

The safe berth clause in the December 1956 contract with Petitioner, if a warranty, was subject as of March 16, 1957 to limitation by the knowledge theretofore acquired; having learned as of that date that due to tides and winds a vessel might not remain at any and all times safely afloat, Republic could not thereafter contend that the warranty meant that it would (Cf. *Hitchcock* v. *Hunt*, 28 Conn. 343, 349-351; *Draper* v. *Sweet*, 66 Barb. (N. Y.) 145, 147; *Bruce* v. *Fiss, Barr & Carroll Horse Co.*, 2 Dept., 47 App. Div. (N. Y.) 273; 5 Williston on Contracts (Rev. Ed.) § 1394). In *Hitchcock* v. *Hunt*, *supra*, pork was sold with a warranty that the barrels would not leak; the buyer discovered a commencement of leakage but took no measures to avoid injury to the pork; it was held that the buyer could not recover for loss of the pork due to leakage, because this was due to his own fault, saying:

> "We cannot consider it necessary to confute a position so preposterous. As well might it be claimed that a person who should buy a ship warranted seaworthy, and, after discovering its deficiency in this respect, should place his goods in it for transportation, could, on their loss from such cause, recover from the vendor their value; or that one who should buy an animal with a warranty against some danger-

> ous habit, or a carriage with a warranty that it was safely built, and, in one case should afterwards, knowing that the animal had that habit, intentionally expose himself to its exercise and receive a personal injury, or, in the other, knowing that the carriage was not safely constructed, ride in it and get hurt, could recover of the vendor on his warranty for such injury. In these and similar cases the injury is considered, and properly, as not arising directly from the defect warranted against, but rather from the want of reasonable care on the part of the purchaser, and for which he has no claim on the warranty" (28 Conn. 350-351).

In all such cases, as Judge (later Justice) Cardozo pointed out in *McClelland* v. *Climax Hosiery Mills*, 252 N. Y. 347, 359, there is not involved mere mitigation of damages, for "He has broken the chain of causation, and loss resulting to him thereafter is suffered through his own act".

The Court of Appeals thus erred in treating the present case of one of mitigation of damages, with the burden on Petitioner to prove mitigation (See opinion below, Petition for Certiorari, appendix p. 8a).

When Republic as of March 16, 1957 chose to make the safe berth clause in its one cargo charter party contract with libellant, Republic, at least, if not both Republic and libellant, did so with the knowledge of risks acquired on the prior voyages, and, consequently, without any right to rely upon the safe berth clause of the December 1956 contract as a warranty that the ship could remain always afloat.

Petitioner was not a charterer; it did not assume liabilities as a charterer; it did not participate in the command or control of the vessel. The Master could not rely and did not rely on the December 1956 contract which was unknown to him. His actions instead were under the March 16, 1957 charter party. Either as Master he was guilty of gross negligence, or what otherwise would have been gross negligence on his part was due to Republic and libellant

deleting clause 28 from the March 16, 1957 charter contract. As Milanowski, the pilot and the Master all knew, the berth was occupied by the Esso barge and, particularly in view of the labor disturbance affecting the use of tugboats, the completion of unloading of the Esso barge could not mean that the berth was available.

Unless reviewed and reversed by this Court, the decision will set a new and dangerous precedent, which must inevitably be later criticised and modified or overruled. The Court's statement at the end of its opinion that "we are confident" that no "attempt at double recovery" will be made, is a most cavalier and unauthorized manner of avoiding the disclosure that libellant failed to prove any title or right whatever to the vessel on which to base either the charter contract or its claim herein.

If, in view of the serious questions presented, the denial of the petition for certiorari was influenced by a failure to show a conflict in decisions interpreting Purchase Order contracts of your Petitioner, *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50, cited in par. 2 of Rule 58, is an authority for reconsideration. The Court said, at 305 U. S. 50:

> "Petition for certiorari . . . was at first denied, there being no conflict of decisions, 303 U. S. 639. We later granted certiorari, 304 U. S. 587, on a petition for rehearing showing that, notwithstanding the doubtful validity of the patents, litigation elsewhere with a resulting conflict of decisions was improbable because of the concentration of the automobile industry in the sixth circuit" (305 U. S. 50).

Your Petitioner, "an agency of the Argentine Government" (Court of Appeals opinion, p. 3a of appendix to Petition for Certiorari) maintains its "Commission in the United States" in New York City, in the Second Circuit, where its Purchase Order contracts covering huge purchases of oil and transportation thereof to Argentina have been made for years and continue to be made, and where

Purchase Orders Nos. N. Y. 1970 and 1971 were made. With a whole nation's (Argentina's) oil and transportation purchasing activities in this country thus concentrated in the Second Circuit, Petitioner is faced with the same circumstance that "litigation elsewhere with a resulting conflict of decisions (is) improbable" (305 U. S. 50).

Conclusion

Your Petitioner's application for rehearing should be granted and its Petition for Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We, the undersigned RALPH BOSCH and CHARLES A. ELLIS, Counsel herein, certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds specified in par. 2 of Rule 58 of the Rules of the Supreme Court of the United States.

Dated, May 10, 1963.

RALPH BOSCH, *Counsel,*

CHARLES A. ELLIS, *of Counsel.*